

Ben F. Pierce Gore (SBN 128515)  
PRATT & ASSOCIATES  
1901 S. Bascom Avenue, Suite 350  
Campbell, CA 95008  
Telephone: (408) 429-6506  
Fax: (408) 369-0752  
[pgore@prattattorneys.com](mailto:pgore@prattattorneys.com)  
(Co-counsel listed on signature page)

*Attorneys for Plaintiffs*

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION

LEVI JONES, CHRISTINE STURGES,  
and EDD OZARD, individually and on  
behalf of all others similarly situated,

Plaintiffs,

v.

CONAGRA FOODS, INC.,

Defendant.

Case No. 12-CV-1633 CRB

**CLASS ACTION AND  
REPRESENTATIVE ACTION**

**AMENDED COMPLAINT FOR  
DAMAGES, EQUITABLE AND  
INJUNCTIVE RELIEF**

**JURY TRIAL DEMANDED**

Plaintiffs Levi Jones, Christine Sturges and Edd Ozard, through their undersigned attorneys, bring this lawsuit against ConAgra Foods, Inc. (hereinafter "ConAgra" or "Defendant") as to their own acts upon personal knowledge, and as to all other matters upon information and belief. In order to remedy the harm arising from Defendant's illegal conduct, which has resulted in unjust profits, Plaintiffs bring this action on behalf of a class of California consumers who, within the last four years purchased a PAM cooking spray product, or a Hunt's canned tomato product, or a Swiss Miss cocoa product (referred to herein as "Misbranded Food Products").

## INTRODUCTION

1  
2           1.       Every day, millions of Americans purchase and consume packaged foods.  
3 Identical federal and California laws require truthful, accurate information on the labels of  
4 packaged foods. This case is about a company that flouts those laws and sells misbranded food to  
5 unsuspecting consumers. The law, however, is clear: misbranded food cannot legally be  
6 manufactured, held, advertised, distributed, or sold. Misbranded food is worthless as a matter of  
7 law, and purchasers of misbranded food are entitled to a refund of their purchase price.

8           2.       If a manufacturer is going to make a claim on a food label, the label must meet  
9 certain legal requirements that help consumers make informed choices and ensure that they are  
10 not misled. Defendant has made, and continues to make, false and deceptive claims in violation  
11 of federal and California laws that govern the types of representations that can be made on food  
12 labels. These laws recognize that reasonable consumers are likely to choose products claiming to  
13 have a health or nutritional benefit over otherwise similar food products that do not claim such  
14 benefits.

15           3.       Under California law, which is identical to federal law, a number of Defendant's  
16 food labeling practices are unlawful because they are deceptive and misleading to consumers.  
17 These include:

18  
19           A.       Representing food products to be "100% natural" when they contain significant  
20 quantities of undisclosed petrochemicals such as Petroleum gas (liquefied), Propane,  
21 Propane 2-methyl (isobutane) and Butane that have comprised 24% or more of the food  
22 products' ingredients;

23           B.       Representing food products to be "100% natural" when they contain significant  
24 quantities of undisclosed chemical preservatives, synthetic chemicals, added artificial  
25 color and other artificial ingredients;

26           C.       Representing food products to be "Organic" or "Certified Organic" or "USDA  
27 Organic" when they contain disqualifying amounts of "synthetic" chemicals and  
28 "[n]onagricultural (nonorganic) substances" that preclude the use of those terms as a  
matter of law;

          D.       Failing to use the common or usual name of ingredients required by law or to list  
ingredients in descending order by weight as required by law thus concealing the  
presence of undisclosed chemicals and petrochemicals such as Petroleum gas (liquefied),

Propane, Propane 2-methyl (isobutane) and Butane that comprise 24% or more of the product and conveying the false impression that chemicals and other nonorganic ingredients comprise smaller percentages of the products than they actually do;

E. Representing food products to be “free of artificial ingredients and preservatives” when they in fact contain artificial ingredients and preservatives;

F. Failing to disclose the presence of chemical preservatives and artificial added colors in the ingredient lists of food products as required by law;

G. Making unlawful nutrient content claims on the labels of food products that fail to meet the minimum nutritional requirements that are legally required for the nutrient content claims that are being made;

H. Making unlawful antioxidant claims on the labels of food products that fail to meet the minimum nutritional requirements that are legally required for the antioxidant claims that are being made;

I. Representing foods to be fresh or have a “fresh taste” when those products have undergone manufacturing processes and contain undisclosed chemical preservatives that preclude any representations about freshness as a matter of law;

J. Making unlawful and unapproved health claims about their products that are prohibited by law; and

K. Making unlawful claims that suggest to consumers that their products can prevent the risk or treat the effects of certain diseases like cancer, osteoporosis, asthma, cardiovascular disease, diabetes, psoriasis, erythema, premature skin aging, sun damage, dementia, Alzheimer’s disease, Parkinson’s disease, and mild cognitive impairment.

4. These practices are not only illegal but they mislead consumers and deprive them of the information they require to make informed purchasing decisions. Thus, for example a mother who reads labels because she wants to purchase all natural foods and does not wish to feed her child foods containing a lighter fluid like butane would be misled and deceived if she, like Plaintiffs, purchased Defendant’s 100% Natural PAM Original cooking spray which actually contained at least 24% Petroleum gas (liquefied), Propane, Propane 2-methyl (isobutane) and Butane but failed to list those petrochemicals in the ingredient list by their common or usual name or by any name that would have disclosed their presence to a consumer. ConAgra omitted this relevant information from the labels of its food products and the only way a consumer could obtain it would be to either subject their food purchases to laboratory analysis or track down the official Material Safety Data Sheets the Defendant prepared for its products where it detailed their

1 true compositions and the health risks attributable to exposure to those products through  
2 ingestion, inhalation, and contact. The identical California and federal labeling laws were  
3 designed so that consumers could get the information they want and need by reading the labels of  
4 the foods they purchased. These laws recognized that consumers should not have to conduct  
5 laboratory analyses or track down Material Safety Data Sheets to ensure they were not purchasing  
6 foods that contained undisclosed ingredients like lighter fluid (butane) they wished to avoid in  
7 their food.

8         5. Similarly, these laws placed numerous requirements on food companies that were  
9 designed to ensure that the claims about their products that they made to consumers were truthful,  
10 accurate and backed by acceptable forms of scientific proof. When companies like ConAgra  
11 make unlawful nutrient content, or antioxidant or health claims that have been prohibited by  
12 regulation consumers like Plaintiffs are misled.

13         6. Identical federal and California laws regulate the content of labels on packaged  
14 food. The requirements of the federal Food, Drug & Cosmetic Act (“FDCA”) were adopted by  
15 the California legislature in the Sherman Food Drug & Cosmetic Law (the “Sherman Law”).  
16 California Health & Safety Code § 109875, *et seq.* Under both the Sherman Law and FDCA  
17 section 403(a), food is “misbranded” if “its labeling is false or misleading in any particular,” or if  
18 it does not contain certain information on its label or in its labeling. California Health & Safety  
19 Code § 110660; 21 U.S.C. § 343(a). Under the FDCA, the term “false” has its usual meaning of  
20 “untruthful,” while the term “misleading” is a term of art. Misbranding reaches not only false  
21 claims, but also those claims that might be technically true, but still misleading. If any single  
22 representation in the labeling is misleading, the entire food is misbranded, and no other statement  
23 in the labeling can cure a misleading statement. “Misleading” is judged in reference to “the  
24 ignorant, the unthinking and the credulous who, when making a purchase, do not stop to analyze.”  
25 *United States v. El-O-Pathic Pharmacy*, 192 F.2d 62, 75 (9<sup>th</sup> Cir. 1951). Under the FDCA, it is  
26 not necessary to prove that anyone was actually misled.

27         7. ConAgra, through its website, claims that it is “one of North America’s leading  
28 food companies” and claims to have consumer brands in 97% of America’s households.

1 ConAgra's major brands include but are not limited to Alexia®, Chef Boyardee®,  
2 Fleischmann's®, Healthy Choice®, Hunt's®, Manwich®, Marie Callender's®, Orville  
3 Redenbacher's®, PAM®, Parkay®, Peter Pan®, Ro\*Tel®, Slim Jim®, Snack Pack®, Swiss  
4 Miss®, Wesson®, and others.

5 8. Through its Hunt's brand, ConAgra packages and sells canned tomatoes, including  
6 Diced Tomatoes, Crushed Tomatoes, Stewed Tomatoes, Whole Tomatoes, Tomato Paste, Tomato  
7 Puree, and Tomato Sauce, including variations of each. The canned tomato industry sometimes  
8 refers to these as the "seven segments." ConAgra sells cooking sprays through its PAM brand  
9 and cocoa through its Swiss Miss brand.

10 9. As consumer preferences have begun to favor healthier options, ConAgra has  
11 embarked on a health and wellness strategy that seeks to emphasize how its products are good for  
12 a consumer and to reposition its products as a healthy option. In furtherance of its health and  
13 wellness strategy, ConAgra utilizes unlawful, false and misleading nutrient content and health  
14 claims to promote and market its Misbranded Food Products. ConAgra has also sought to appeal  
15 to consumer preferences for natural and functional foods by including unlawful, false and  
16 misleading "100% natural" claims, "Organic" claims, antioxidant claims, nutrient content claims,  
17 no preservatives claims, ingredient claims, and fresh claims on its Misbranded Food Product  
18 labels and product related materials. ConAgra has also engaged in a host of unlawful labeling  
19 practices designed to conceal those aspects of its foods that are not in line with consumer  
20 preferences. Thus, for example, ConAgra concealed the fact that certain varieties of its PAM  
21 cooking spray purchased by Plaintiffs contained at least 24% Petroleum gas (liquefied), Propane,  
22 Propane 2-methyl (isobutane) and Butane by failing to list those ingredients by their common or  
23 useful name in the ingredient list.

24 10. ConAgra's reason for making such claims and engaging in deceptive and unlawful  
25 labeling practices is driven by its pecuniary interests. As stated by ConAgra in the Risk Factors  
26 section of the most recent annual report it filed with the S.E.C.:

27 Consumer preferences evolve over time and the success of our food products  
28 depends on our ability to identify the tastes and dietary habits of consumers and  
to offer products that appeal to their preferences, including concerns of

1 consumers regarding health and wellness, obesity, product attributes, and  
2 ingredients. Introduction of new products and product extensions requires  
3 significant development and marketing investment. If our products fail to meet  
4 consumer preference, or we fail to introduce new and improved products on a  
5 timely basis, then the return on that investment will be less than anticipated and  
6 our strategy to grow sales and profits with investments in marketing and  
innovation will be less successful. Similarly, demand for our products could be  
affected by consumer concerns regarding the health effects of ingredients such  
as sodium, trans fats, sugar, processed wheat, or other product ingredients or  
attributes.

7 11. In other ConAgra reports, ConAgra has identified the following risk to the  
8 company:

9 Health care issues facing the United States and health-conscious consumer  
10 expectations have put increasing pressure on the food industry to constantly  
11 evaluate the nutritional profiles of its products. If our products fail to keep up  
12 with health trends and consumer expectations, our business performance may  
be negatively impacted.

13 ConAgra indicated that to address this risk it needed to:

14 ...stay aligned with consumer preferences and improve the nutritional value of  
15 our products to establish a competitive advantage in the marketplace.

16 12. In furtherance of its health and wellness strategy ConAgra has utilized a number of  
17 specific unlawful, improper, unauthorized, misleading and false antioxidant, nutrient content,  
18 fresh, "Organic" and "100% natural" claims on its products' labels and labeling. These include:

19 A. "100% natural" claims on the labels of its Hunt's canned tomato  
20 products and its PAM cooking spray products that contain ingredients that are  
21 not natural such as Petroleum gas (liquefied), Propane, Propane 2-methyl  
(isobutane) and Butane and whose claims of naturalness have been the subject  
22 of prior regulatory action;

23 B. "Organic" claims on the labels of certain varieties of PAM  
24 cooking spray that contain synthetic and nonorganic ingredients at disqualifying  
levels;

25 C. "Free of artificial ingredients & preservatives" claims on the  
26 labels of its Hunt's canned tomato products that contain artificial ingredients  
and chemical preservatives;

27 D. Antioxidant claims on the labels of its Hunt's canned tomato  
28 products and Swiss Miss cocoa products which fail to meet the minimum  
regulatory requirements for such antioxidant claims; and

1           E. Claims that ConAgra's Hunt's canned tomato products are  
 2 "potassium-rich" and "provide more than twice the potassium than other  
 3 common potassium sources" like bananas, potatoes, nonfat milk and orange  
 4 juice when such claims are false and are prohibited by federal and California  
 law.

5           13. ConAgra recognizes that health and nutrition claims drive food sales, and actively  
 6 promotes the purported health and nutritional benefits of its Misbranded Food Products,  
 7 notwithstanding the fact that such promotion violates federal and California law.

8           14. For example, according to ConAgra "canned tomatoes users are nutrient-driven."  
 9 "These buyers are discriminating—often age 40 and older, with the maturity to understand that  
 10 what they eat affects their wellness. They want to feed their families nutritionally sound meals,  
 11 and as busy as they are, they willingly spend more time cooking than most. They value the short  
 12 ingredients statements on Hunt's products, and they categorize canned tomatoes as a 'less-  
 13 processed' food that deserves to be on their table."

14           15. ConAgra also recognized that consumers were looking for natural options stating  
 15 "Moms nowadays are looking for better-for-you products for their families. They want simple  
 16 recipes, natural ingredients and quality at a fair price."

17           16. ConAgra was aware, however, that because consumers only spend 5 to 10 seconds  
 18 before making a decision to purchase, the "traditional brand blocking approach to this category  
 19 [of sales] doesn't serve today's focused, time-pressed, health-seeking consumers." For such  
 20 consumers, label claims and other forms of advertising and marketing could help drive sales,  
 21 particularly if placed prominently on the front of product packaging. Such consumers, however,  
 22 would not have the time to examine claims or labels in detail.

23           17. For example, ConAgra has made a number of specific claims about its canned  
 24 tomato products including:

- 25           A. Tomatoes are a health promoting food;
- 26           B. Antioxidant properties lend tomatoes toward lowering risk for a  
 27 number of chronic diseases and improving health status overall;
- 28           C. Hunt's® Tomatoes are available in many varieties, including No  
 Salt Added options, which makes it easy to incorporate the



health benefits of tomatoes into your daily meals;

D. Tomatoes are nutrient dense;

E. Tomatoes are a package of phyto/bioactive nutrients associated with health;

F. Tomatoes deliver on multiple consumer demands;

G. Tomatoes offer Taste, Convenience, Calories, Cost, Health.

18. ConAgra specifically promotes the antioxidant properties and antioxidant health benefits of its tomato-based canned products. ConAgra maintains the website <http://www.conagrafoodscienceinstitute.com>, which contains the following statements:

A. A natural source of antioxidants, Hunt's® tomatoes are prepared and packed using a FlashSteam® process to remove the peel;

B. Hunt's tomatoes provide:

- Highly bioavailable lycopene

C. Antioxidant properties lend tomatoes toward lowering risk for a number of chronic diseases and improving health status overall.

19. ConAgra also has issued press releases and other marketing materials touting the healthy nature of its canned tomato products, including that tomatoes “may have a measurable impact on heart disease prevention” and contribute to “a significant decrease in blood pressure.” <http://media.conagrafoods.com/phoenix.zhtml?c=202310&p=irol-newsArticle&ID=1494219&highlight>.

20. In promoting the purported benefits of its Misbranded Food Products, including Hunt's canned tomato products, ConAgra claims it has adopted responsible marketing and advertising policies. ConAgra claims to understand the importance of communicating responsibly about its products.

21. Nevertheless, ConAgra has made, and continues to make, unlawful, false and deceptive claims on its Misbranded Food Products in violation of identical federal and California laws that govern the types of representations that can be made on food labels. In particular, in



1 making its unlawful antioxidant claims on its Misbranded Food Products, Defendant has violated  
2 nutrient content labeling regulations and misbranding laws mandated by identical federal and  
3 California laws. In making its “100% Natural,” “Organic” and other claims, Defendant has  
4 violated a number of other food labeling and misbranding laws mandated by identical federal and  
5 California laws including those prohibiting false or misleading label claims.

6 22. Defendant has made, and continues to make, unlawful claims on the food labels of  
7 its Misbranded Food Products that are prohibited by identical federal and California laws and  
8 which render these products misbranded. Under federal and California law, Defendant’s  
9 Misbranded Food Products, including Hunt’s canned tomato products, PAM cooking spray, and  
10 Swiss Miss cocoa, cannot legally be manufactured, advertised, distributed, held or sold.  
11 Defendant’s false and misleading labeling practices stem from its global marketing strategy.  
12 Thus, for example, the Defendant unlawfully placed its false “100% Natural” claim on a wide  
13 range of products described below.

#### 14 **PARTIES**

15 23. Plaintiff Levi Jones is a resident of Santa Rosa, California who purchased  
16 Defendant’s Misbranded Food Products in California during the four (4) years prior to the filing  
17 of this Complaint (the “Class Period”).

18 24. Plaintiff Christine Sturges is a resident of Campbell, California who purchased  
19 Defendant’s Misbranded Food Products in California during the four (4) years prior to the filing  
20 of this Complaint (the “Class Period”).

21 25. Plaintiff Edd Ozard is a resident of Alamo, California who purchased Defendant’s  
22 Misbranded Food Products in California during the four (4) years prior to the filing of this  
23 Complaint (the “Class Period”).

24 26. Defendant ConAgra is a Delaware corporation with its principal place of business  
25 at One ConAgra Drive in Omaha, Nebraska 68102.

26 27. Defendant is a leading producer of retail food products, including the products  
27 described herein.

1           28. Defendant sells its Misbranded Food Products to consumers through grocery and  
2 other retail stores throughout California.

3                                   **JURISDICTION AND VENUE**

4           29. This Court has original jurisdiction over this action under 28 U.S.C. § 1332(d)  
5 because this is a class action in which: (1) there are over 100 members in the proposed class;  
6 (2) members of the proposed class have a different citizenship from Defendant; and (3) the claims  
7 of the proposed class members exceed \$5,000,000 in the aggregate.

8           30. The Court has jurisdiction over the federal claim alleged herein pursuant to 28  
9 U.S.C. § 1331, because it arises under the laws of the United States.

10          31. The Court has jurisdiction over the California claims alleged herein pursuant to 28  
11 U.S.C. § 1367, because they form part of the same case or controversy under Article III of the  
12 United States Constitution.

13          32. Alternatively, the Court has jurisdiction over all claims alleged herein pursuant to  
14 28 U.S.C. § 1332, because the matter in controversy exceeds the sum or value of \$75,000, and is  
15 between citizens of different states.

16          33. The Court has personal jurisdiction over Defendant because a substantial portion  
17 of the wrongdoing alleged in this Complaint occurred in California, Defendant is authorized to do  
18 business in California, has sufficient minimum contacts with California, and otherwise  
19 intentionally avails itself of the markets in California through the promotion, marketing and sale  
20 of merchandise, sufficient to render the exercise of jurisdiction by this Court permissible under  
21 traditional notions of fair play and substantial justice.

22          34. Because a substantial part of the events or omissions giving rise to these claims  
23 occurred in this District and because the Court has personal jurisdiction over Defendant, venue is  
24 proper in this Court pursuant to 28 U.S.C. § 1391(a) and (b).

## **FACTUAL ALLEGATIONS**

### **A. Identical California And Federal Laws Regulate Food Labeling**

35. Food manufacturers are required to comply with federal and state laws and regulations that govern the labeling of food products. First and foremost among these is the FDCA and its labeling regulations, including those set forth in 21 C.F.R. § 101.

36. Pursuant to the Sherman Law, California has expressly adopted the federal labeling requirements as its own and indicated that “[a]ll food labeling regulations and any amendments to those regulations adopted pursuant to the federal act, in effect on January 1, 1993, or adopted on or after that date shall be the food regulations of this state.” California Health & Safety Code § 110100.

37. In addition to its blanket adoption of federal labeling requirements, California has also enacted a number of laws and regulations that adopt and incorporate specific enumerated federal food laws and regulations. For example, food products are misbranded under California Health & Safety Code § 110660 if their labeling is false and misleading in one or more particulars; they are misbranded under California Health & Safety Code § 110665 if their labeling fails to conform to the requirements for nutrient labeling set forth in 21 U.S.C. § 343(q) and regulations adopted thereto; they are misbranded under California Health & Safety Code § 110670 if their labeling fails to conform with the requirements for nutrient content and health claims set forth in 21 U.S.C. § 343(r) and regulations adopted thereto; they are misbranded under California Health & Safety Code § 110705 if words, statements and other information required by the Sherman Law to appear on their labeling are either missing or not sufficiently conspicuous; they are misbranded under California Health & Safety Code § 110725 if they fail to bear labels clearly stating the common or usual name of each ingredient they contain; they are misbranded under California Health & Safety Code § 110735 if they are represented as having special dietary uses but fail to bear labeling that adequately informs consumers of their value for that use; and they are misbranded under California Health & Safety Code § 110740 if they contain artificial flavoring, artificial coloring and chemical preservatives but fail to adequately disclose that fact on their labeling.

1 **B. FDA Enforcement History**

2 38. In recent years the FDA has become increasingly concerned that food  
3 manufacturers were disregarding food labeling regulations. To address this concern, the FDA  
4 elected to take steps to inform the food industry of its concerns and to place the industry on  
5 notice that food labeling compliance was an area of enforcement priority.

6 39. In October 2009, the FDA issued a Guidance For Industry: Letter regarding Point  
7 Of Purchase Food Labeling ("2009 FOP Guidance"), to address its concerns about front of  
8 package labels. The 2009 FOP Guidance advised the food industry:

9  
10 FDA's research has found that with FOP labeling, people are less likely to  
11 check the Nutrition Facts label on the information panel of foods (usually, the  
12 back or side of the package). It is thus essential that both the criteria and  
13 symbols used in front-of-package and shelf-labeling systems be nutritionally  
14 sound, well-designed to help consumers make informed and healthy food  
15 choices, and not be false or misleading. The agency is currently analyzing FOP  
16 labels that appear to be misleading. The agency is also looking for symbols that  
17 either expressly or by implication are nutrient content claims. We are assessing  
18 the criteria established by food manufacturers for such symbols and comparing  
19 them to our regulatory criteria.

20 It is important to note that nutrition-related FOP and shelf labeling, while  
21 currently voluntary, is subject to the provisions of the Federal Food, Drug, and  
22 Cosmetic Act that prohibit false or misleading claims and restrict nutrient  
23 content claims to those defined in FDA regulations. Therefore, FOP and shelf  
24 labeling that is used in a manner that is false or misleading misbrands the  
25 products it accompanies. Similarly, a food that bears FOP or shelf labeling with  
26 a nutrient content claim that does not comply with the regulatory criteria for the  
27 claim as defined in Title 21 Code of Federal Regulations (CFR) 101.13 and  
28 Subpart D of Part 101 is misbranded. We will consider enforcement actions  
against clear violations of these established labeling requirements. . .

... Accurate food labeling information can assist consumers in making healthy  
nutritional choices. FDA intends to monitor and evaluate the various FOP  
labeling systems and their effect on consumers' food choices and perceptions.  
FDA recommends that manufacturers and distributors of food products that  
include FOP labeling ensure that the label statements are consistent with FDA  
laws and regulations. FDA will proceed with enforcement action against  
products that bear FOP labeling that are explicit or implied nutrient content  
claims and that are not consistent with current nutrient content claim  
requirements. FDA will also proceed with enforcement action where such FOP  
labeling or labeling systems are used in a manner that is false or misleading.

1           40.     The 2009 FOP Guidance recommended that “manufacturers and distributors of  
2 food products that include FOP labeling ensure that the label statements are consistent with FDA  
3 law and regulations” and specifically advised the food industry that it would “proceed with  
4 enforcement action where such FOP labeling or labeling systems are used in a manner that is  
5 false or misleading.”

6           41.     Despite the issuance of the 2009 FOP Guidance, Defendant did not remove the  
7 unlawful and misleading food labeling claims from its Misbranded Food Products.

8           42.     On March 3, 2010, the FDA issued an “Open Letter to Industry from [FDA  
9 Commissioner] Dr. Hamburg” (“Open Letter”). The Open Letter reiterated the FDA’s concern  
10 regarding false and misleading labeling by food manufacturers. In pertinent part the letter stated:

11                   In the early 1990s, the Food and Drug Administration (FDA) and the food  
12 industry worked together to create a uniform national system of nutrition  
13 labeling, which includes the now-iconic Nutrition Facts panel on most food  
14 packages. Our citizens appreciate that effort, and many use this nutrition  
15 information to make food choices. Today, ready access to reliable information  
16 about the calorie and nutrient content of food is even more important, given the  
17 prevalence of obesity and diet-related diseases in the United States. This need  
is highlighted by the announcement recently by the First Lady of a coordinated  
national campaign to reduce the incidence of obesity among our citizens,  
particularly our children.

18                   With that in mind, I have made improving the scientific accuracy and  
19 usefulness of food labeling one of my priorities as Commissioner of Food and  
20 Drugs. The latest focus in this area, of course, is on information provided on  
the principal display panel of food packages and commonly referred to as  
“front-of-pack” labeling. The use of front-of-pack nutrition symbols and other  
claims has grown tremendously in recent years, and it is clear to me as a  
working mother that such information can be helpful to busy shoppers who are  
often pressed for time in making their food selections. ...

23                   As we move forward in those areas, I must note, however, that there is one area  
24 in which more progress is needed. As you will recall, we recently expressed  
25 concern, in a “Dear Industry” letter, about the number and variety of label  
claims that may not help consumers distinguish healthy food choices from less  
healthy ones and, indeed, may be false or misleading.

26                   At that time, we urged food manufacturers to examine their product labels in  
27 the context of the provisions of the Federal Food, Drug, and Cosmetic Act that  
28 prohibit false or misleading claims and restrict nutrient content claims to those  
defined in FDA regulations. As a result, some manufacturers have revised their

1 labels to bring them into line with the goals of the Nutrition Labeling and  
2 Education Act of 1990. Unfortunately, however, we continue to see products  
marketed with labeling that violates established labeling standards.

3 To address these concerns, FDA is notifying a number of manufacturers that  
4 their labels are in violation of the law and subject to legal proceedings to  
5 remove misbranded products from the marketplace. While the warning letters  
6 that convey our regulatory intentions do not attempt to cover all products with  
7 violative labels, they do cover a range of concerns about how false or  
misleading labels can undermine the intention of Congress to provide  
consumers with labeling information that enables consumers to make informed  
and healthy food choices ....

8 These examples and others that are cited in our warning letters are not  
9 indicative of the labeling practices of the food industry as a whole. In my  
10 conversations with industry leaders, I sense a strong desire within the industry  
for a level playing field and a commitment to producing safe, healthy products.  
That reinforces my belief that FDA should provide as clear and consistent  
11 guidance as possible about food labeling claims and nutrition information in  
12 general, and specifically about how the growing use of front-of-pack calorie  
and nutrient information can best help consumers construct healthy diets.

13 I will close with the hope that these warning letters will give food  
14 manufacturers further clarification about what is expected of them as they  
15 review their current labeling. I am confident that our past cooperative efforts  
on nutrition information and claims in food labeling will continue as we jointly  
16 develop a practical, science-based front-of-pack regime that we can all use to  
help consumers choose healthier foods and healthier diets.

17  
18 43. Notwithstanding the Open Letter, Defendant continued to utilize unlawful food  
19 labeling claims despite the express guidance of the FDA in the Open Letter.

20 44. In addition to its guidance to industry, the FDA has sent warning letters to  
21 industry, including the Defendant and many of Defendant's peer food manufacturers for the same  
22 types of unlawful nutrient content claims described above.

23 45. In these letters dealing with unlawful nutrient content claims the FDA indicated  
24 that as a result of the same type of claims utilized by the Defendant, products were in "violation  
25 of the Federal Food, Drug, and Cosmetic Act ... and the applicable regulations in Title 21, Code  
26 of Federal Regulations, Part 101 (21 CFR 101)" and were "misbranded within the meaning of  
27 section 403(r)(1)(A) because the product label bears a nutrient content claim but does not meet  
28 the requirements to make the claim." Similarly, letters such as the one received by the Defendant

1 for unlawful “all natural” claims similar to those at issue here indicated that the products at issue  
2 were “misbranded under section 403(a)(1) of the Act” because their labels were “false and  
3 misleading.”

4 46. The warning letters were hardly isolated as the FDA has issued over 10 other  
5 warning letters to other companies for the same type of food labeling claims at issue in this case.

6 47. The FDA stated that the agency not only expected companies that received  
7 warning letters to correct their labeling practices but also anticipated that other firms would  
8 examine their food labels to ensure that they are in full compliance with food labeling  
9 requirements and make changes where necessary. ConAgra did not change the labels on its  
10 Misbranded Food Products in response to the warning letters sent to other companies nor did it  
11 change its labels on its Misbranded Food Products when it ultimately received a warning letter  
12 from the FDA.

13 48. Defendant also has ignored the FDA’s Guidance for Industry, A Food Labeling  
14 Guide which details the FDA’s guidance on how to make food labeling claims. Defendant  
15 continues to utilize unlawful claims on the labels of its Misbranded Food Products. Despite all  
16 warnings, Defendant’s Misbranded Food Products continue to run afoul of FDA guidance as well  
17 as federal and California law.

18 49. Despite the FDA’s numerous warnings to industry, Defendant has continued to sell  
19 products bearing unlawful food labeling claims without meeting the requirements to make them.

20 50. Despite the fact that it has repeatedly been sued for its unlawful labeling practices,  
21 Defendant continues to engage in them. Thus this action is at least the third action against the  
22 Defendant that challenges its “100% natural” or “all natural” labeling practices and the second  
23 one since the Defendants received an FDA warning letter for those practices and yet with the  
24 exception of changing the labeling of isolated products as the result of FDA enforcement or as  
25 part of a litigation settlement, Defendant continues to engage in the unlawful practices.

26 51. Plaintiffs did not know, and had no reason to know, that Defendant’s Misbranded  
27 Food Products were misbranded and bore food labeling claims despite failing to meet the  
28 requirements to make those food labeling claims. Similarly, Plaintiffs did not know, and had no



reason to know, that Defendant's Misbranded Food Products were misbranded because their labeling was false and misleading.

**C. Defendant's Food Products Are Misbranded**

**1. Defendant Makes Unlawful "100% NATURAL" Claims**

52. The term "natural" adds a premium to food products and makes them appear fresher, minimally processed, and safer. Seeking to profit from consumers' desire for natural food products and recognizing that the labeling of products as "all natural" or "100% natural" implicitly conveys to consumers that the products carry health benefits important to consumers, ConAgra has falsely represented its Hunt's canned tomato products and PAM Cooking spray products as all natural when that is not true. On the principal display panel of its product labels, ConAgra claims that such products are "100% Natural" despite the fact that they contain a host of artificial and synthetic ingredients which have undergone substantial processing and which include various petrochemicals such as Petroleum gas (liquefied), Propane, Propane 2-methyl (isobutane) and even the lighter fluid Butane as well as various artificial chemical preservatives and coloring agents and other chemicals that have been classified by regulators as being synthetic and artificial and which have been held to preclude the labeling of the very types of products at issue here as being "natural."

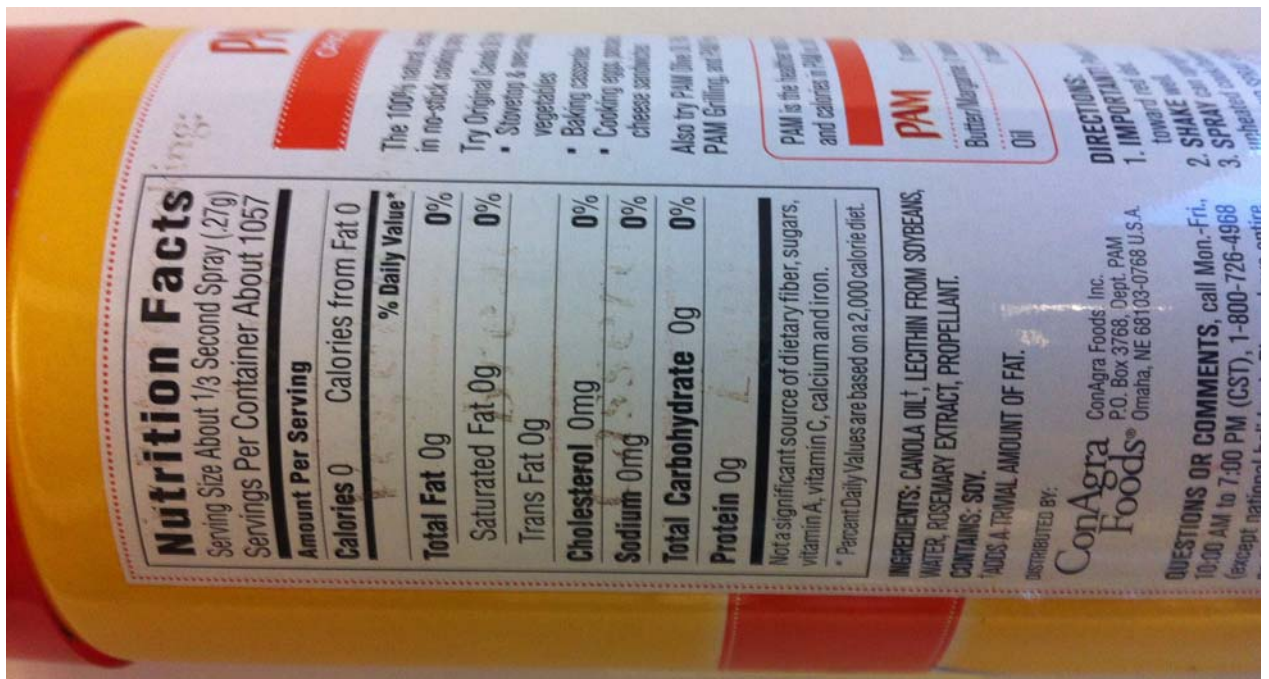
53. Consumers such as Plaintiffs expect that products labeled "100% natural" will be just that and that to be natural a food should contain no artificial or synthetic ingredients and that both it and its ingredients should have had no more processing than something which could be made in a household kitchen. Consumers reasonably expect that products carrying a "100% natural" claim must not contain any artificial flavoring, color ingredients, chemical preservatives, or artificial or synthetic ingredients, and be only minimally processed by a process that does not fundamentally alter the raw product. Consumers certainly expect food labeled "100% natural" to be free of the petrochemicals such as Petroleum gas (liquefied), Propane, Propane 2-methyl (isobutane) and Butane that were present in Defendant's purportedly "100% natural" products at

levels of at least 24% according to the Material Safety Data Sheets prepared by the Defendant for these products.

**A. ConAgra Falsely Labels Its PAM Cooking Spray Products As “100% Natural”**

54. Until very recently, Defendant included the phrase “100% NATURAL” on the principal display panel and other parts of the product labels of its PAM cooking sprays which contained unnatural propellant. It still does so on its website and on the labels of its purportedly “Organic” and “Certified Organic” PAM cooking sprays which contain unnatural, synthetic ingredients.

55. For example, 100% Natural PAM Original cooking spray lists “PROPELLANT” as an ingredient, with no mention of the chemical composition of PROPELLANT:



56. ConAgra’s August 3, 2010 Material Safety Data Sheet (MSDS) for 100% Natural PAM Original cooking spray (Exhibit D) reveals the chemical composition of 100% Natural PAM Original cooking spray’s propellant, and the percentage, by weight, of the “Hazardous Components” in 100% Natural PAM Original cooking spray:

Petroleum gas (liquefied)	10% to 18%
Propane	> 7%

Propane, 2-methyl- > 7%

Butane < 1%

Exhibit D, p.3. In stark contrast to its MSDS, nowhere does the label or Nutrition Facts panel of 100% Natural PAM Original cooking spray disclose that it contains a substantial percentage, by weight, of Petroleum gas (liquefied), Propane, Propane 2-methyl (isobutane) and Butane. Nowhere does PAM cooking spray packaging mention the health hazards associated with PAM's undisclosed "PROPELLANT" ingredients.

57. Defendant has made and continues make the same illegal "100% Natural" claims on their websites and advertising in violation of federal and California law.

58. A reasonable consumer would expect that when Defendant labels its products as "100% NATURAL," the product's ingredients are "natural" as commonly understood and would not be contrary to the policy of any governmental regulator. A reasonable consumer would expect that when Defendant labels its products as "100% NATURAL," the product ingredients are "natural" under the common use of that word. A reasonable consumer would expect that "100% NATURAL" products do not contain synthetic, artificial, or excessively processed ingredients. A reasonable consumer would expect that "100% NATURAL" products do not contain a substantial percentage of Petroleum gas (liquefied), Propane, Propane 2-methyl (isobutane) and Butane.

59. Consumers are thus misled into purchasing and paying a premium for Defendant's products with unnatural ingredients that are not "100% NATURAL" as falsely represented on their labeling.

60. Defendant's claims in this respect are false and misleading and the products in this respect are misbranded under federal and California law. Misbranded products cannot be legally sold or held and are legally worthless.

61. Plaintiffs purchased PAM cooking spray including the 100% Natural PAM original and 100% Natural Certified Organic Olive Oil varieties in reliance on Defendant's false representations that the products were "100% Natural." Had Plaintiffs known this representation was false they would not have bought the products or paid a premium for them.

62. Had Plaintiffs been aware that the 100% Natural PAM cooking spray products they purchased contained any amount (let alone the actual high levels) of Petroleum gas (liquefied), Propane, Propane 2-methyl (isobutane), Butane or any chemical listed pursuant to California's Proposition 65 because it was known to the state to cause cancer or reproductive toxicity, they would not have purchased the products or knowingly used them as food. Similarly, had Plaintiffs been aware that the 100% Natural PAM Certified Organic cooking spray products they purchased contained disqualifying amounts of "synthetic" chemicals and "[n]onagricultural (nonorganic) substances that precluded the products from being classified, represented or labeled as "Organic" or "Certified Organic," they would not have purchased the products. Plaintiffs had other alternatives that lacked such ingredients and Plaintiff also had cheaper alternatives.

**B. ConAgra Falsely Labels Its Canned Tomato Products As "100% Natural"**

63. Defendant has unlawfully labeled a number of its products as being "100% NATURAL" when they actually contain artificial ingredients and/or chemical preservatives. These include Defendant's canned tomato products.

64. Defendant includes the phrase "100% NATURAL" at the top of the principal display panel on the product labels of its Hunt's brand canned tomato products, despite the fact that Defendant's canned tomato products contain the ingredients citric acid and/or calcium chloride objected to by the FDA.

65. The back panel of ConAgra's product labels for its Hunt's canned tomato products lists citric acid as an ingredient, and sometimes also list calcium chloride. The product label for Hunt's Diced Tomatoes lists both citric acid and calcium chloride but not in a way that would cause a consumer to doubt the "100% natural" claim as Defendant unlawfully fails to indicate these ingredients are being used as chemical preservatives or firming agents.

66. According to standardized requirements for canned tomatoes (21 C.F.R. § 155.190) citric acid may only be used for acidification purposes while calcium chloride may only be used as a firming agent. These uses are both artificial and a form of chemical preservation thus

1 rendering the “100% NATURAL” label statement false and misleading which results in the  
2 Hunt’s canned tomato products being misbranded under California law.

3 67. Upon information and belief, some of ConAgra’s competitors in the canned  
4 tomato product market also include citric acid and/or calcium chloride as ingredients, but those  
5 competitors do not make a “100% natural” claim on the product labels.

6 68. Upon information and belief, some of ConAgra’s competitors in the canned or  
7 packaged tomato product market do not include citric acid or calcium chloride in their tomato  
8 products.

9 69. ConAgra itself produces non-canned tomato products like ketchup that do not  
10 contain citric acid or calcium chloride.

11 70. The FDA has sent warning letters relating to the use of a “Natural” label when a  
12 product contains citric acid and/or calcium chloride.

13 71. The FDA has determined – specifically with respect to canned tomato products –  
14 that “the addition of calcium chloride and citric acid to these products preclude use of the term  
15 ‘natural’ to describe this product.”

16 72. In the August 29, 2001, FDA “Hirzel warning letter” (attached hereto as Exhibit  
17 A) the FDA specifically found that “labels for canned tomato products manufactured by” Hirzel  
18 were “in violation of Section 403 of the Federal Food Drug, and Cosmetic Act (the Act) and Title  
19 21, Code of Federal Regulations (CFR), Part 101- Food Labeling.” Among other reasons, the  
20 Hirzel warning letter stated in pertinent part:

21 [The product] labels bear the term “All NATURAL,” but  
22 according to the ingredient statements, calcium chloride and citric  
23 acid are added to the products. We have not established a  
24 regulatory definition for the term “natural,” however; we discussed  
25 its use in the [preamble] to the food labeling final regulations (58  
26 Federal Register 2407, January 6, 1993). FDA’s policy regarding  
27 the use “natural,” means that nothing artificial or synthetic has  
28 been included in, or has been added to, a food that would not  
normally be expected to be in the food. Therefore, the addition of  
calcium chloride and citric acid to these products preclude use of  
the term “natural” to describe this product.

<http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2001/ucm178343.htm>

73. Defendant knew or should have known of the Hirzel warning letter. Because Defendant's products contain the same ingredients prohibited by the FDA in other tomato products, the use of the claim "100% NATURAL" on Defendant's tomato product labels is false and misleading, and therefore these products are misbranded under section 403(a)(1) of the Act.

74. On August 16, 2001, the FDA sent a warning letter to Oak Tree Farm Dairy, Inc. ("Oak Tree warning letter" attached hereto as Exhibit B). The letter "found serious violations" of the Federal Food, Drug, and Cosmetic Act and Title 21, Code of Federal Regulations, Part 101 – Food Labeling (21 CFR 101), and stated in pertinent part:

The term "all natural" on the "OAKTREE ALL NATURAL LEMONADE" label is inappropriate because the product contains potassium sorbate. Although FDA has not established a regulatory definition for "natural," we discussed its use in the preamble to the food labeling final regulations (58 Federal Register 2407, January 6, 1993, copy enclosed). FDA's policy regarding the use of "natural," means nothing artificial or synthetic has been included in, or has been added to, a food that would not normally be expected to be in the food. The same comment applies to use of the terms "100 % NATURAL" and "ALL NATURAL" on the "OAKTREE REAL BREWED ICED TEA" label because it contains citric acid.

<http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2001/ucm178712.htm>

75. Defendant knew or should have known of the Oak Tree warning letter.

76. On November 16, 2011, the FDA sent a warning letter to ConAgra's own subsidiary, Alexia Foods, Inc., informing Alexia of its failure to comply with the requirements of the FDCA and its regulations ("Alexia Warning Letter," attached hereto as Exhibit C). The Alexia Warning Letter stated, in pertinent part:

The U.S. Food and Drug Administration (FDA) has reviewed the labels for your Alexia brand Roasted Red Potatoes & Baby Portabella Mushrooms products. Based on our review, we have concluded that these products are in violation of the Federal Food, Drug, and Cosmetic Act (the Act). You can find copies of the Act and the FDA regulations through links in FDA's home page at <http://www.fda.gov>.



1 Your Alexia brand Roasted Red Potatoes & Baby Portabella  
2 Mushrooms product is misbranded within the meaning of section  
3 403(a)(1) of the Act [21 U.S.C. 343(a)(1)], which states that a food  
4 shall be deemed to be misbranded if its labeling is false or  
5 misleading in any particular. The phrase “All Natural” appears at  
6 the top of the principal display panel on the label. FDA considers  
7 use of the term “natural” on a food label to be truthful and non-  
8 misleading when “nothing artificial or synthetic...has been  
9 included in, or has been added to, a food that would not normally  
10 be expected to be in the food.” [58 FR 2302, 2407, January 6,  
11 1993].

12 Your Alexia brand Roasted Red Potatoes & Baby Portabella  
13 Mushrooms product contains disodium dihydrogen pyrophosphate,  
14 which is a synthetic chemical preservative. Because your products  
15 contain this synthetic ingredient, the use of the claim “All Natural”  
16 on this product label is false and misleading, and therefore your  
17 product is misbranded under section 403(a)(1) of the Act.

18 We note that your Alexia brand products market a number of food  
19 products with the “All Natural” statement on the label. We  
20 recommend that you review all of your product labels to be  
21 consistent with our policy to avoid additional misbranding of your  
22 food products.

23 This letter is not intended to be an all-inclusive review of your  
24 products and their labeling. It is your responsibility to ensure that  
25 all of your products and labeling comply with the Act and its  
26 implementing regulations. You should take prompt action to  
27 correct the violations cited in this letter. Failure to do so may  
28 result in enforcement action without further notice. Such action  
may include, but is not limited to, seizure or injunction.

<http://www.fda.gov/ICECI/EnforcementActions/WarningLetters/ucm281118.htm>

77. Defendant knew or should have known of the Alexia warning letter.

78. In its rule-making and warning letters to manufacturers, as described herein, the  
FDA has repeatedly stated its policy to restrict the use of the term “natural” in connection with  
added color, synthetic substances, and flavors as provided in 21 C.F.R. § 101.22.

79. The FDA has also repeatedly affirmed its policy regarding the use of the term  
“natural” as meaning that nothing artificial or synthetic has been included in, or has been added  
to, a food that would not normally be expected to be in the food.



1           80.     The FDA considers use of the term “natural” on a food label to be truthful and  
 2 non-misleading when “nothing artificial or synthetic...has been included in, or has been added to,  
 3 a food that would not normally be expected to be in the food.” *See* 58 FR 2302, 2407, January 6,  
 4 1993.

5           81.     Any coloring or preservative can preclude the use of the term “natural” even if the  
 6 coloring or preservative is derived from natural sources. The FDA distinguishes between natural  
 7 and artificial flavors in 21 C.F.R. § 101.22.

8           82.     The FDA has sent out numerous warning letters concerning this issue. *See, e.g.*,  
 9 Exhibit A (August 29, 2001 FDA warning letter to Hirzel Canning Company relating to citric  
 10 acid or calcium chloride in tomato products); Exhibit B (August 16, 2001 FDA warning letter to  
 11 Oak Tree Farm Dairy relating to citric acid); and Exhibit C (November 16, 2011 FDA warning  
 12 letter to Alexia relating to synthetic chemical preservatives). Defendant is aware of these FDA  
 13 warning letters.

14           83.     The National Advertising Division of the Council of Better Business Bureaus has  
 15 determined that ConAgra Foods should discontinue the claim certain of its tomato related claims  
 16 because in connection with the term “100% Natural” they might falsely leave consumers with the  
 17 impression that Hunt’s tomato products were prepared from fresh unprocessed ingredients.

18           84.     Defendant’s claims in this respect are false and misleading and the products in this  
 19 respect are misbranded under federal and California law. Misbranded products cannot be legally  
 20 sold or held and are legally worthless.

21           85.     Plaintiffs purchased Hunt’s canned tomato products in reliance on Defendant’s  
 22 false representations that the products were “100% Natural.” Had Plaintiffs known this  
 23 representation was false they would not have bought the products or paid a premium for them.  
 24 Plaintiffs had other alternatives that lacked such ingredients and Plaintiff also had cheaper  
 25 alternatives.

26           **2. Defendant Makes Unlawful “Organic” and “Certified Organic” Claims**

27           86.     Defendant has violated California law by selling varieties of PAM cooking spray  
 28 such as the 100% Natural PAM Certified Organic Olive Oil cooking spray purchased by Plaintiffs

1 that contained label representations that the products were “Organic” and “Certified Organic” and  
2 which bore the USDA Organic Seal when those products were precluded from doing so because  
3 of the disqualifying levels of one or more “synthetic” chemicals and “[n]onagricultural  
4 (nonorganic) substances” contained in those products.

5 87. California has adopted a comprehensive scheme to regulate organic products. As  
6 part of this effort California regulates the use of terms such as “Organic” and “Certified Organic.”  
7 In regulating organic products and the use of terms such as “Organic” and “Certified Organic”  
8 California has adopted regulations and laws identical to the federal National Organic Program  
9 (“NOP”) established pursuant to the Organic Foods Production Act of 1990. Pursuant to  
10 California Health & Safety Code § 110820:

11 Except as otherwise provided in this article, no product shall be sold as organic pursuant  
12 to this article unless it is produced according to regulations promulgated by the NOP, and  
13 consists entirely of products manufactured only from raw or processed agricultural  
14 products except as follows:(a) Water, air, and salt may be added to the product.(b)  
15 Ingredients other than raw or processed agricultural products may be added to the product  
16 if these ingredients include nonagricultural substances or nonorganically produced  
17 agricultural products produced in a manner consistent with, or which are on the national  
18 list adopted by the United States Secretary of Agriculture pursuant to Section 6517 of the  
19 NOP and do not represent more than 5 percent of the weight of the total finished product,  
20 excluding salt and water.

21 88. Pursuant to California Health & Safety Code § 110830:

22 No product handled, processed, sold, advertised, represented, or offered for sale in this  
23 state, shall be sold as organic unless it also is prominently labeled and invoiced with  
24 similar terminology as set forth by regulations promulgated by the NOP.

25 89. Moreover, California has expressly adopted the federal organic labeling standards  
26 and regulations as its own pursuant to California Health & Safety Code § 110956 which states  
27 “[a]ll organic product regulations and any amendments to those regulations adopted pursuant to  
28 the NOP, that are in effect on the date this bill is enacted or that are adopted after that date shall  
be the organic product regulations of this state.

29 90. Pursuant to these regulations, products with at least 95 percent organic content by  
30 weight or fluid volume, excluding water and salt, may use the term “organic.” 7 C.F.R. §  
205.301(b). In addition, products labeled “organic” may also display the USDA Organic seal on

1 the Principal Display Panel of the product label. 7 C.F.R. § 205.303(a)(4). The remaining five  
2 percent of the product must consist of organically produced agricultural products, unless these are  
3 not commercially available in organic form. In cases where minor ingredients are not  
4 commercially available in organic form, then non-organically produced ingredients maybe used,  
5 provided they are approved for use on the National List. 7 C.F.R. § 205.301(b). The ingredients  
6 declaration must identify all organic ingredients with the word “organic” or an asterisk or other  
7 reference mark that refers to a statement indicating the ingredient is organically produced.

8 91. The labels of Defendant’s “100% Natural PAM Organic and Certified Organic  
9 cooking sprays contained label representations that the products were “Organic” and “Certified  
10 Organic” and bore the USDA Organic Seal when those products were precluded from doing so  
11 because of the disqualifying levels of one or more “synthetic” chemicals and “[n]onagricultural  
12 (nonorganic) substances contained in those products. In particular, the products contained  
13 disqualifying levels of carbon dioxide which is listed as both a “synthetic” chemical and a type of  
14 “[n]onagricultural (nonorganic) substance” pursuant to 7 C.F.R. § 205.605(b). It also appears that  
15 the products contained disqualifying levels of nonorganic lecithin. While the label specifies that  
16 the olive oil and grain alcohol were both organic, the lecithin was not so identified which would  
17 be in accordance with legal requirements only if it were nonorganic since all organic items must  
18 be identified.

19 92. Despite the 5% ceiling for synthetic and nonorganic ingredients these products  
20 contained significantly higher levels of these restricted ingredients. For example, according to an  
21 official December, 2011 Material Safety Data Sheet for the 100% Natural Certified Organic Olive  
22 Oil cooking spray purchased by Plaintiffs, the carbon dioxide content of the product was as high  
23 as 10% and the lecithin content was as high as 8%. Thus, either ingredient was capable of  
24 independently precluding the use of the seal or any other form of organic labeling and certainly  
25 was capable of doing so in combination with the other.

26 93. Moreover, organic forms of lecithin appear to be commercially available and thus  
27 it would be unlawful to use a nonorganic version in a product that was to be labeled “Organic” or  
28

1 bear the USDA Organic Seal even if the amount of the nonorganic ingredient comprised less than  
2 5% of the final product.

3 94. A reasonable consumer would expect that when a manufacturer labels and  
4 represents a product as “Organic” or “Certified Organic” or places the USDA Organic Seal on a  
5 product that the product meets the minimum legal requirements to bear the labeling claims and  
6 the seal and that the representations are true. A reasonable consumer would expect that when  
7 Defendant claims its product is “Organic” or “Certified Organic” that its ingredients whether  
8 disclosed or undisclosed and whether listed under their common and usual or not would not  
9 preclude the product from qualifying as “Organic” or “Certified Organic” as a matter of law.

10 95. Plaintiffs did not know, and had no reason to know, that Defendant’s PAM  
11 Products were misbranded because they bore organic labeling claims and seals they were not  
12 legally permitted to make because the products failed to meet the minimum requirements under  
13 identical California and federal law for those claims and seals.

14 96. Consumers are thus misled into purchasing Defendant’s purportedly “Organic”  
15 products which were not in fact organic as a matter of law.

16 97. Had Plaintiffs been aware that the 100% Natural PAM Certified Organic cooking  
17 spray products were not in fact organic as a matter of law, they would not have purchased the  
18 products.

19 98. Similarly, had Plaintiffs been aware that the “synthetic” chemicals and  
20 “[n]onagricultural (nonorganic) substances were such a significant component of the 100%  
21 Natural Certified Organic cooking spray products, they would not have purchased the products.

22 99. Plaintiffs were thus misled by Defendant’s unlawful labeling practices and actions  
23 into purchasing products they would not have otherwise purchased had they known the truth  
24 about those products. Plaintiffs had other alternatives that lacked such ingredients and Plaintiff  
25 also had cheaper alternatives.

26 100. Defendant’s claims in this respect are false and misleading and the products are in  
27 this respect misbranded under identical federal and California laws, Misbranded products cannot  
28

be legally sold and are legally worthless. Plaintiffs and members of the Class who purchased these products paid an unwarranted premium for these products.

3.  
**Defendant Violates California Law By Failing To Label Its Product Ingredients By Their Common Names Thus Concealing The Fact That Its Purportedly “100% Natural” And “Organic” Food Products Contain High Levels Of Synthetic Chemicals And Petrochemicals That Preclude Their Being Labeled As “100% Natural” Or “Organic”**

101. In violation of identical California and federal law, Defendant concealed the fact that its PAM cooking spray products contained significant amounts of undisclosed petrochemicals such as Petroleum gas (liquefied), Propane, Propane 2-methyl (isobutane) and Butane as well as other undisclosed chemicals.

102. The Defendant did this by failing to disclose these ingredients in the ingredient statements for PAM cooking spray products despite the fact that, as confirmed by an official August 3, 2010 Material Safety Data Sheet prepared by the Defendant for its 100% Natural PAM cooking spray products, the products contained up to 18% Petroleum gas (liquefied), more than 7% Propane, more than 7% Propane 2-methyl (isobutane) and up to 1% Butane as well as other undisclosed chemical ingredients that could comprise up to 10% of the products.

103. Earlier Material Safety Data Sheets prepared by the Defendant for PAM cooking spray reveal the presence of significant quantities of nitrous oxide a chemical placed on California’s Proposition 65 list, a list of chemicals known to the state to cause cancer or reproductive toxicity which trigger a duty to provide clear and reasonable warnings to inform citizens about exposures to such chemicals.

104. Under California law “[a]ny food fabricated from two or more ingredients is misbranded unless it bears a label clearly stating the common or usual name of each ingredient” (California Health & Safety Code § 110725). California’s law is identical to federal law on this point.

105. Moreover, California has expressly adopted the federal regulations as its own. Thus California has adopted the requirements of 21 C.F.R. § 101.4 which mandate that the ingredient names listed on product labels be the common or usual name of those ingredients.

1           106. In its guidance for industry and warning letters to manufacturers, the FDA has  
2 repeatedly stated its policy of restricting the ingredient names listed on product labels to their  
3 common or usual name, as provided in 21 C.F.R. § 101.4(a)(1).

4           107. An ingredient's common or usual name is the name established by common usage  
5 or regulation, as provided in 21 C.F.R. § 102.5(d) which has been adopted by the State of  
6 California.

7           108. The common or usual name must accurately describe the basic nature of the food  
8 or its characterizing properties or ingredients, as provided in 21 C.F.R. § 102.5(a).

9           109. The purpose of these laws and regulations is to ensure that consumers are provided  
10 with accurate information about products and their ingredients so they can make informed  
11 purchasing decisions. Consumers can avoid chemicals and ingredients they wish to avoid in  
12 particular products and can select products that contain the ingredients consumers desire.

13           110. Absent such disclosures and labeling practices, consumers cannot, except by luck  
14 or happenstance, avoid chemicals like the ones listed on the Material Safety Data Sheets that the  
15 Defendant describes as posing both chronic and acute risks to health and life. For example,  
16 current Material Safety Data Sheets for ConAgra products containing nitrous oxide indicate that  
17 "[r]epeated overexposure to nitrous oxide has been linked to adverse reproductive effects" and  
18 note that at high concentrations it has been linked to "spontaneous abortions in humans."  
19 Similarly, the Material Safety Data Sheets for PAM cooking spray products containing propane  
20 and butane indicate that "[t]his product contains propane and butane which are known to cause  
21 central nervous system depression and cardiovascular symptoms" and further warn that an  
22 overdose can result in a host of complications including seizure and death from cardiac  
23 arrhythmias. Even the Material Safety Data Sheets for PAM cooking spray products containing  
24 carbon dioxide state that under certain circumstances inhalation of the product could result in  
25 death and that ingestion of the product could result in irritation.

26           111. Ignoring California law and its incorporated federal regulations and guidance,  
27 Defendant mislabeled its Misbranded Food Products so that consumers were deprived of accurate  
28 information and, in fact, Plaintiffs and the members of the class were misled by Defendant's

1 concealment of chemicals and petrochemicals they wished to avoid 1) in their food, 2) in products  
2 labeled "100% natural" and 3) in products labeled "Organic" or "Certified Organic."

3 112. For example, the back panel of Defendant's 100% Natural PAM Original cooking  
4 spray lists "PROPELLANT" as an ingredient despite the fact that propellant is not the common or  
5 usual name of any of the various petrochemicals that this product actually contained. According  
6 to an official August 3, 2010 Material Safety Data Sheet prepared by the Defendant for this  
7 product, 100% Natural PAM Original cooking spray actually contained up to 18% Petroleum gas  
8 (liquefied), more than 7% Propane, more than 7% Propane 2-methyl (isobutane) and up to 1%  
9 Butane.

10 113. In listing "PROPELLANT" as an ingredient, and failing to list the actual  
11 ingredients (Petroleum gas (liquefied), Propane, Propane 2-methyl (isobutane) and Butane) by  
12 their common and usual names, Defendant not only misled Plaintiffs and the Class by concealing  
13 the presence of these petrochemicals in products labeled "100% Natural," Defendant also violated  
14 California Health & Safety Code § 110725 and the federal regulations (21 C.F.R. §§ 101.4 and  
15 102.5) that have been adopted as law by the State of California. Specifically, Defendant has  
16 failed to disclose the presence of the Petroleum gas (liquefied), Propane, Propane 2-methyl  
17 (isobutane) and Butane by their common or usual names, as required by California Health &  
18 Safety Code § 110725 and 21 C.F.R. §§ 101.4 and 102.5.

19 114. Similarly, the back panel of Defendant's 100% Natural Certified Organic PAM  
20 Olive Oil cooking spray lists "PROPELLANT" as an ingredient despite the fact that propellant is  
21 not the common or usual name of the chemical (carbon dioxide) that this product contained.  
22 According to an official December, 2011 Material Safety Data Sheet prepared by the Defendant  
23 for this product (Exhibit E), 100% Natural Certified Organic PAM Olive Oil cooking spray  
24 actually contained up to 10% carbon dioxide which is classified under identical California and  
25 federal law as a "synthetic" chemical and a type of "[n]onagricultural (nonorganic) substance[]"  
26 not allowed as an ingredient in processed products labeled as "Organic" except at far lower (5%  
27 or less) levels than the up to 10% level listed on the December, 2011 Material Safety Data Sheet  
28 prepared by the Defendant for this product.



1           115. In listing “PROPELLANT” as an ingredient, and failing to list the actual  
2 ingredients (carbon dioxide) by its common and usual name, Defendant not only misled Plaintiffs  
3 and the Class by concealing the presence of this “synthetic” and “[n]onagricultural (nonorganic)  
4 substance[]” in products labeled “100% Natural,” and “Certified Organic,” Defendant also  
5 violated California Health & Safety Code § 110725 and the federal regulations (21 C.F.R. §§  
6 101.4 and 102.5) that have been adopted as law by the State of California. Specifically, Defendant  
7 has failed to disclose the presence of the carbon dioxide or to list it as an ingredient by its  
8 common or usual name, as required by California Health & Safety Code § 110725 and 21 C.F.R.  
9 §§ 101.4 and 102.5.

10           116. In addition to mislabeling the labels of its PAM products, Defendant has also  
11 failed to disclose or identify the chemicals and petrochemicals identified above by their common  
12 names on its websites and advertising in violation of identical California and federal law.

13           117. A reasonable consumer would expect that when a manufacturer lists the  
14 ingredients on its products, the product’s ingredients are given their common or usual name as  
15 required by law. A reasonable consumer would also expect that when a manufacturer lists the  
16 ingredients on its products it would use the same names required on its Material Safety Data  
17 Sheets. A reasonable consumer would expect that when a manufacturer claims its product is  
18 100% natural that its ingredients, whether disclosed or undisclosed, and, whether listed under  
19 their common and usual or not, would be all natural and not synthetic or artificial or unnatural. A  
20 reasonable consumer would certainly not expect a food product that was labeled 100% natural to  
21 contain undisclosed petrochemicals or synthetic chemicals. A reasonable consumer would expect  
22 that when a manufacturer claims its product is “Organic” or “Certified Organic” that its  
23 ingredients, whether disclosed or undisclosed, and, whether listed under their common and usual  
24 or not, would not preclude the product from qualifying as organic or certified organic as a matter  
25 of law.

26           118. Plaintiffs did not know, and had no reason to know, that Defendant’s PAM  
27 Products were misbranded because they failed to list undisclosed chemicals and petrochemicals  
28 as ingredients or to name those ingredients by the ingredients’ common or usual name, despite

1 identical California and federal regulations requiring that that the chemicals and petrochemicals  
2 be listed as ingredients by their common and usual names.

3 119. Consumers are thus misled into purchasing Defendant's products with false and  
4 misleading ingredient names, which do not describe the basic nature of the food or its  
5 characterizing properties or ingredients, as provided in California Health & Safety Code § 110725  
6 and 21 C.F.R. §§ 101.4 and 102.5(a) both of which have been adopted as law by California..

7 120. Had Plaintiffs been aware that the 100% Natural PAM cooking spray products  
8 they purchased contained any amount (let alone the actual high levels) of Petroleum gas  
9 (liquefied), Propane, Propane 2-methyl (isobutane), Butane or any chemical listed pursuant to  
10 California's Proposition 65 because it was known to the state to cause cancer or reproductive  
11 toxicity, they would not have purchased the products or knowingly used them as food. Similarly,  
12 had Plaintiffs been aware that the 100% Natural PAM Certified Organic cooking spray products  
13 they purchased contained disqualifying amounts of "synthetic" chemicals and "[n]onagricultural  
14 (nonorganic) substances that precluded the products from being classified, represented or labeled  
15 as "Organic" or "Certified Organic," they would not have purchased the products. Plaintiffs had  
16 other alternatives that lacked such ingredients and Plaintiff also had cheaper alternatives.

17 121. Defendant's claims in this respect are false and misleading and the products are in  
18 this respect misbranded under identical federal and California law, including California Health &  
19 Safety Code § 110725. Misbranded products cannot be legally sold and are legally worthless.  
20 Plaintiffs and members of the Class who purchased these products paid an unwarranted premium  
21 for these products.

22 **4. Defendant Violates California Law By Failing To List Its Product Ingredients**  
23 **In Descending Order Of Predominance By Weight.**

24 122. Under identical California and federal law, ingredients must be listed in  
25 descending order of predominance by weight. 21 C.F.R. § 101.4 (adopted by California).

26 123. Such laws are designed to ensure consumers can determine if ingredients that are  
27 important to them are either significant components of particular products or not and how those  
28 ingredients compare relative to other ingredients.

124. Defendant violates these regulations on its PAM cooking spray products by listing as its last ingredient “Propellant” a component of the product which constitutes a significant percentage of the product that is far greater than other ingredients listed before this ingredient.

125. For example, as confirmed by an official August 3, 2010 Material Safety Data Sheet prepared by the Defendant for its 100% Natural PAM Original cooking spray products, the products contained up to 18% Petroleum gas (liquefied), more than 7% Propane, more than 7% Propane 2-methyl (isobutane) and up to 1% Butane as propellant. Thus, even a single component of this propellant mix such as the Petroleum gas (liquefied) would represent a larger amount by weight than some of the ingredients that precede it in the ingredient list as the Material Safety Data Sheet indicate that the soy lecithin was no more than 8% of the product and could have been as low as 2%. Similarly, the other ingredients that were listed after the lecithin but ahead of the propellant such as the preservative, rosemary extract, would also appear to be a smaller component than the propellant mix as a whole or even some of its components like Petroleum gas (liquefied). Another example would be the fact that Propellant was listed last in the ingredient list on the label of Defendant’s 100% Natural PAM Certified Organic Olive Oil despite the fact that an official December, 2011 Material Safety Data Sheet for this product reveals that the carbon dioxide that comprised the propellant comprised up to 10% of the product and thus should have been listed ahead of other ingredients such as lecithin that were present at lower percentages.

126. The failure to list ingredients in descending order of predominance by weight misbrands products under identical California and federal laws. It also misleads consumers such as Plaintiffs who relied on the labels into the erroneous belief that ingredients such as the synthetic chemicals and petrochemicals that comprised the propellant mix were a small component of the product less than even preservatives and anti-foaming agents, which is false.

127. Had Plaintiffs been aware that the Petroleum gas (liquefied), Propane, Propane 2-methyl (isobutane), Butane and other chemicals comprising the propellant mix were such a significant component of the 100% Natural PAM cooking spray products, they would not have purchased the products. Similarly, had Plaintiffs been aware that the “synthetic” chemicals and “[n]onagricultural (nonorganic) substance[]” were such a significant component of the 100%

1 Natural Certified Organic cooking spray products, they would not have purchased the products.  
 2 Plaintiffs had other alternatives that lacked such ingredients and Plaintiff also had cheaper  
 3 alternatives.

4 128. Defendant's label claims in this respect are false and misleading and the products  
 5 are in this respect misbranded under identical federal and California laws, Misbranded products  
 6 cannot be legally sold and are legally worthless. Plaintiffs and members of the Class who  
 7 purchased these products paid an unwarranted premium for these products.

8 **5. Defendant Violates California Law By Making Unlawful And False Claims**  
 9 **That Its Misbranded Food Products Are "Free Of Artificial Ingredients &**  
 10 **Preservatives" And By Failing To Disclose On Its Misbranded Food**  
 11 **Products' Labels The Presence Of Preservatives In Those Products As**  
 12 **Required By California Law**

13 129. Despite the fact that its Misbranded Food Products contained chemical  
 14 preservatives and artificial ingredients, the Defendant falsely stated on the labels of its  
 15 Misbranded Food Products that they were "free of artificial ingredients & preservatives." This  
 16 statement was demonstrably false and misled consumers such as Plaintiffs who relied on the  
 17 statements.

18 130. For example, Defendant's Hunt's tomato products, such as the diced tomatoes and  
 19 tomato paste purchased by Plaintiffs, bore such a false labeling statement. In fact, these products  
 20 contained a number of chemical preservatives and artificial ingredients such as citric acid and  
 21 calcium chloride which, as discussed below, fall squarely within the definition of chemical  
 22 preservatives incorporated into California and federal law.

23 131. According to the standardized requirements for canned tomatoes (21 C.F.R. §  
 24 155.190) citric acid may only be used for acidification purposes while calcium chloride may only  
 25 be used as a firming agent. Given that these uses are both artificial and a form of preservation, the  
 26 label statement "free of artificial ingredients & preservatives" is both false and misleading and  
 27 renders the Hunt's canned tomato products misbranded.

28 132. Moreover, even if the Defendant had not included a false representation that its  
 Misbranded Food Products were "free of artificial ingredients & preservatives" on its product

1 labels, these products would have still been misbranded as a matter of law because of  
2 Defendant's failure to disclose the presence of such ingredients as mandated by identical  
3 California and federal law.

4 133. "Under California law "food is misbranded if it bears or contains any artificial  
5 flavoring, artificial coloring, or chemical preservative, unless its labeling states that fact  
6 (California Health & Safety Code § 110740). California's law is identical to federal law on this  
7 point.

8 134. Pursuant to 21 C.F.R. § 101.22 which has been adopted by California, "[a]  
9 statement of artificial flavoring, artificial coloring, or chemical preservative shall be placed on the  
10 food or on its container or wrapper, or on any two or all three of these, as may be necessary to  
11 render such statement likely to be read by the ordinary person under customary conditions of  
12 purchase and use of such food." 21 C.F.R. § 101.22 defines a chemical preservative as "any  
13 chemical that, when added to food, tends to prevent or retard deterioration thereof, but does not  
14 include common salt, sugars, vinegars, spices, or oils extracted from spices, substances added to  
15 food by direct exposure thereof to wood smoke, or chemicals applied for their insecticidal or  
16 herbicidal properties."

17 135. Defendant's Misbranded Food Products were misbranded because they contained  
18 chemical preservatives but failed to disclose that fact.

19 136. For example, while Defendant's Hunt's brand "100% natural" canned tomato  
20 products, such as the diced tomatoes and tomato paste purchased by Plaintiffs, contain citric acid  
21 which is used in those products as an acidulant which is a type of chemical preservative designed  
22 to retard spoilage in canned vegetables, their labels fail to disclose the fact that the citric acid is  
23 being used as a preservative in those products by including a parenthetical such as (preservative)  
24 or (to retard spoilage) after the term citric acid in the ingredient statement. Because Defendant  
25 unlawfully fails to indicate these ingredients are being used as chemical preservatives or firming  
26 agents a reasonable consumer would have no reason to doubt the preservative free claim as these  
27 ingredients could have been used for some other purpose such as flavoring in the case of citric  
28 acid but for the limitation on doing so contained in the standard of identity for tomatoes.

1           137. Similarly, while a number of Defendant's Hunt's Brand "100% natural" canned  
2 tomato products, such as the diced tomatoes purchased by Plaintiffs, contain calcium chloride  
3 which is used in those products as an firming agent which is a type of chemical preservative  
4 designed to prevent canned vegetables from becoming soft and mushy, their labels fail to disclose  
5 the fact that the calcium chloride is being used as a preservative in those products by including a  
6 parenthetical such as (firming agent) after the term calcium chloride in the ingredient statement.

7           138. Similarly, the version of 100% Natural PAM Original cooking spray purchased by  
8 Plaintiffs contained the preservative "rosemary extract" without disclosing that this ingredient  
9 was functioning as a preservative, although very recently ConAgra has apparently recognized that  
10 its failure to do so was unlawful and started to add the parenthetical (preservative) after this  
11 ingredient in the ingredient list. Other examples exist as some varieties of PAM such as the butter  
12 flavor contained the artificial coloring annatto without disclosing the fact that it was being use as  
13 artificial color, although it appears ConAgra has recently rectified this fact by adding a  
14 parenthetical indicating its use as a color.

15           139. A reasonable consumer would expect that when the Defendant made a  
16 representation on its products' labels that such products were "free of artificial ingredients &  
17 preservatives" that such a representation was true, A reasonable consumer would also expect that  
18 when Defendant lists its products' ingredients that it would make all disclosures required by law  
19 such as the disclosure of chemical preservatives and coloring mandated by identical California  
20 and federal law.

21           140. Plaintiffs saw Defendant's label representations that its products were "free of  
22 artificial ingredients & preservatives" and relied on them in the reasonable expectation that such a  
23 representation was true, Plaintiffs based their purchasing decisions in part on the belief that these  
24 products did not contain chemical preservatives or artificial ingredients.

25           141. Plaintiffs did not know, and had no reason to know, that Defendant's Misbranded  
26 Food Products contained undisclosed chemical preservatives and other artificial ingredients  
27 because 1) the Defendant falsely represented on its label that the products were "free of artificial  
28

1 ingredients & preservatives” and 2) failed to disclose those chemical preservatives and artificial  
2 ingredients as required by California and federal law.

3 142. Consumers are thus misled into purchasing Defendant’s products with false and  
4 misleading labeling statements and ingredient descriptions, which do not describe the basic nature  
5 of the ingredients, as required by California Health & Safety Code § 110740 and 21 C.F.R. §§  
6 101.22 which has been adopted as law by California..

7 143. Had Plaintiffs been aware that the Misbranded Food Products they purchased  
8 contained chemical preservatives and artificial ingredients they would not have purchased the  
9 products. Plaintiffs had other alternatives that lacked such ingredients and Plaintiff also had  
10 cheaper alternatives.

11 144. Because of their false label representations and omissions about chemical  
12 preservatives and artificial ingredients Defendant’s Misbranded Food Products are in this respect  
13 misbranded under identical federal and California law, including California Health & Safety Code  
14 § 110740. Misbranded products cannot be legally sold and are legally worthless. Plaintiffs and  
15 members of the Class who purchased these products paid an unwarranted premium for these  
16 products.

17 **6. Defendant Makes Unlawful Nutrient Content Claims**

18 145. Pursuant to Section 403 of the FDCA, a claim that characterizes the level of a  
19 nutrient in a food is a “nutrient content claim” that must be made in accordance with the  
20 regulations that authorize the use of such claims. 21 U.S.C. § 343(r)(1)(A). California expressly  
21 adopted the requirements of 21 U.S.C. § 343(r) in Section 110670 of the Sherman Law.

22 146. Nutrient content claims are claims about specific nutrients contained in a product.  
23 They are typically made on food packaging in a font large enough to be read by the average  
24 consumer. Because consumers rely upon these claims when making purchasing decisions, the  
25 regulations govern what claims can be made in order to prevent misleading claims.

26 147. Section 403(r)(1)(A) of the FDCA governs the use of expressed and implied  
27 nutrient content claims on labels of food products that are intended for sale for human  
28 consumption. *See* 21 C.F.R. § 101.13.



1           148. 21 C.F.R. § 101.13 provides the general requirements for nutrient content claims,  
2 which California has expressly adopted. California Health & Safety Code § 110100.

3           149. An “expressed nutrient content claim” is defined as any direct statement about the  
4 level (or range) of a nutrient in the food (*e.g.*, “low sodium” or “contains 100 calories”). *See* 21  
5 C.F.R. § 101.13(b)(1).

6           150. An “implied nutrient content claim” is defined as any claim that: (i) describes the  
7 food or an ingredient therein in a manner that suggests that a nutrient is absent or present in a  
8 certain amount (*e.g.*, “high in oat bran”); or (ii) suggests that the food, because of its nutrient  
9 content, may be useful in maintaining healthy dietary practices and is made in association with an  
10 explicit claim or statement about a nutrient (*e.g.*, “healthy, contains 3 grams (g) of fat”). 21  
11 C.F.R. § 101.13(b)(2)(i-ii).

12           151. These regulations authorize use of a limited number of defined nutrient content  
13 claims. In addition to authorizing the use of only a limited set of defined nutrient content terms on  
14 food labels, these regulations authorize the use of only certain synonyms for these defined terms.  
15 If a nutrient content claim or its synonym is not included in the food labeling regulations it cannot  
16 be used on a label. Only those claims, or their synonyms, that are specifically defined in the  
17 regulations may be used. All other claims are prohibited. 21 CFR 101.13(b).

18           152. Only approved nutrient content claims will be permitted on the food label, and all  
19 other nutrient content claims will misbrand a food. It is thus clear which types of claims are  
20 prohibited and which types are permitted. Manufacturers are on notice that the use of an  
21 unapproved nutrient content claim is prohibited conduct. 58 FR 2302. In addition, 21 USC  
22 343(r)(2), whose requirements have been adopted by California, prohibits using unauthorized  
23 undefined terms and declares foods that do so to be misbranded.

24           153. In order to appeal to consumer preferences, Defendant has repeatedly made  
25 unlawful nutrient content claims about Lycopene and unnamed antioxidants that fail to utilize one  
26 of the limited defined terms. These nutrient content claims are unlawful because they fail to  
27 comply with the nutrient content claim provisions in violation of 21 C.F.R. §§ 101.13 and 101.54,  
28 which are incorporated in California’s Sherman Law. To the extent that the terms used to describe

1 Lycopene and unnamed antioxidants are deemed to be a synonym for a defined term like  
2 “contain” the claim would still be unlawful because, as these nutrients do not have established  
3 daily values, they cannot serve as the basis for a term that has a minimum daily value threshold as  
4 the defined terms at issue here do.

5 154. Similarly, the regulations specify absolute and comparative levels at which foods  
6 qualify to make these claims for particular nutrients (*e.g.*, .low fat, . . . more vitamin C) and list  
7 synonyms that may be used in lieu of the defined terms. Certain implied nutrient content claims  
8 (*e.g.*, .healthy.) also are defined. The daily values (DVs) for nutrients that the FDA has  
9 established for nutrition labeling purposes have application for nutrient content claims, as well.  
10 Claims are defined under current regulations for use with nutrients having established DVs;  
11 moreover, relative claims are defined in terms of a difference in the percent DV of a nutrient  
12 provided by one food as compared to another. *See, e.g.* 21 C.F.R. §§ 101.13 and 101.54.

13 155. Defendant has repeatedly made unlawful nutrient content claims about Lycopene  
14 and potassium that fail to utilize one of the limited defined terms appropriately. These nutrient  
15 content claims are unlawful because they fail to comply with the nutrient content claim provisions  
16 in violation of 21 C.F.R. §§ 101.13 and 101.54, which have been incorporated in California’s  
17 Sherman Law. They are false because the terms have defined minimum nutritional thresholds so  
18 that, for example, a claim that a product “contains” a nutrient is a claim that the product has at  
19 least 10% of the daily value of that nutrient. By using defined terms improperly, Defendant was, in  
20 effect, falsely asserting that the products met the minimum nutritional thresholds for the claims in  
21 question which its products failed to qualify for. By using undefined terms, Defendant was, in  
22 effect, falsely asserting that its products met at least the lowest minimum threshold for any  
23 nutrient content claim which would have been 10% of the daily value of the nutrient at issue.  
24 Such a threshold represents the lowest level that a nutrient can be present in a food before it  
25 becomes deceptive and misleading to highlight its presence in a nutrient content claim.

26 156. For example, the labels of Hunt’s tomato products purchased by Plaintiffs have  
27 utilized two separate unlawful Lycopene nutrient content claims. The first was a claim that the  
28 particular tomato product was a “natural source” of the antioxidant Lycopene. An example being

1 “OUR PROMISE Our Tomatoes Are Always ... A natural source of Antioxidants –Vitamin C &  
 2 Lycopene.” The second was a claim that the antioxidant Lycopene was found naturally in  
 3 tomatoes. An example being “OUR PROMISE Our Tomatoes Are Always ...The Antioxidants  
 4 Vitamin C and Lycopene are found naturally in tomatoes.” Both types of label claims are claims  
 5 are improper nutrient content claims.

6 157. This has been made clear by prior FDA enforcement actions targeting similar or  
 7 identical claims. For example on March 24, 2011, the FDA sent Jonathan Sprouts, Inc. a warning  
 8 letter where it specifically targeted a “source” type claim like the one used on Defendant’s tomato  
 9 products. In that letter the FDA stated:

10 Your Organic Clover Sprouts product label bears the claim “Phytoestrogen Source[.]”  
 11 Your webpage entitled “Sprouts, The Miracle Food! - Rich in Vitamins, Minerals and  
 12 Phytochemicals” bears the claim “Alfalfa sprouts are one of our finest food sources of . . .  
 13 saponin.” These claims are nutrient content claims subject to section 403(r)(1)(A) of the  
 14 Act because they characterize the level of nutrients of a type required to be in nutrition  
 15 labeling (phytoestrogen and saponin) in your products by use of the term “source.” Under  
 16 section 403(r)(2)(A) of the Act, nutrient content claims may be made only if the  
 characterization of the level made in the claim uses terms which are defined by regulation.  
 However, FDA has not defined the characterization “source” by regulation. Therefore,  
 this characterization may not be used in nutrient content claims.

17 158. It is thus clear that a “source” claim like the one utilized on the labels of Hunt’s  
 18 tomato products such as those purchased by Plaintiffs are unlawful because the “FDA has not  
 19 defined the characterization ‘source’ by regulation” and thus such a “characterization may not be  
 20 used in nutrient content claims.” Similarly, a claim that the nutrient Lycopene is “found” in  
 21 tomatoes is improper because it is either an undefined characterization that a nutrient is found in a  
 22 food at some undefined level or because it is a synonym for a defined term like “contains” as  
 23 there is no difference in meaning between the statement “tomatoes contain Lycopene” and the  
 24 statement “Lycopene is found in tomatoes.” Both characterize the fact the tomatoes contain  
 25 Lycopene at some undefined level. These claims are false because they falsely imply that the  
 26 levels of nutrients in the food are capable of satisfying the minimum nutritional threshold  
 27 established by regulation

28 159. The Defendant made similar unlawful nutrient content claims on the labels of its

1 Swiss Miss cocoa products claiming that unnamed antioxidants were found in cocoa. It also  
2 claimed that Swiss Miss cocoa was a “natural source” of unnamed antioxidants.

3 160. Claims that ConAgra’s Hunt’s canned tomato products are “potassium-rich” are  
4 unlawful and false because Hunt’s canned tomato products do not meet the minimum nutrient  
5 level threshold to make such a claim which is 20 percent or more of the RDI (Reference Daily  
6 Intake or Recommended Daily Intake) or the DRV (Daily Reference Value) of potassium per  
7 reference amount customarily consumed. Similarly, claims that ConAgra’s Hunt’s canned tomato  
8 products “provide” or “contain” Lycopene are unlawful and false because Lycopene does not  
9 have an RDI and therefore Hunt’s canned tomato products do not meet the minimum nutrient  
10 level threshold to make such a claim which is 10 percent or more of the RDI or the DRV per  
11 reference amount customarily consumed. Claims that ConAgra’s Hunt’s canned tomato products  
12 “have more than twice the potassium than other common potassium sources” like bananas,  
13 potatoes, nonfat milk and orange juice fail to meet the criteria for such a claim as well. 21 C.F.R.  
14 §§ 101.13 and 101.54.

15 161. In addition, claims that ConAgra’s Hunt’s canned tomato products have “more”  
16 than twice the potassium than other common potassium sources” like potatoes, nonfat milk and  
17 orange juice are literally false and misleading and another reason the Hunt’s tomato products are  
18 misbranded.

19 162. Claims that ConAgra products contain or are made with an ingredient that is  
20 known to contain a particular nutrient, or is prepared in a way that affects the content of a  
21 particular nutrient in the food, can only be made if it is a “good source” of the nutrient that is  
22 associated with the ingredient or type of preparation. Thus, statements on canned tomato product  
23 labels that the tomatoes are a “source” of Lycopene or that Lycopene is found in tomatoes trigger  
24 a “good source” (10 percent or more of the RDI or the DRV per reference amount customarily  
25 consumed) which Lycopene and tomatoes cannot demonstrate. Similarly, statements on Swiss  
26 Miss cocoa product labels that cocoa is a “source” of unnamed antioxidants or that unnamed  
27 antioxidants are found in cocoa trigger a “good source” (10 percent or more of the RDI or the  
28

1 DRV per reference amount customarily consumed) which the cocoa and unnamed antioxidants  
2 cannot demonstrate. 21 C.F.R. § 101.65(c)(3).

3 163. The nutrient content claims regulations discussed above are intended to ensure that  
4 consumers are not misled as to the actual or relative levels of nutrients in food products.

5 164. Plaintiffs relied on these nutrient content claims when making their purchase  
6 decisions and were misled because they erroneously believed the implicit misrepresentation that  
7 the tomato and cocoa products they were purchasing met the minimum nutritional threshold to  
8 make such claims. Plaintiffs would not have purchased these products had they known that the  
9 tomatoes and cocoa did not in fact satisfy such minimum nutritional requirements with regard to  
10 Lycopene, potassium and unnamed antioxidants. Plaintiffs had other alternatives that lacked such  
11 ingredients and Plaintiff also had cheaper alternatives.

12 165. For these reasons, Defendant's nutrient content claims at issue in this Complaint  
13 are false and misleading and in violation of 21 C.F.R. § 101.13 and California law, and the  
14 products at issue are misbranded as a matter of law. Defendant has violated these referenced  
15 regulations. Therefore, Defendant's Misbranded Food Products are misbranded as a matter of  
16 federal and California law and cannot be sold or held because they are legally worthless.

17 **7. Defendant Makes Unlawful Antioxidant Claims**

18 166. On its product labels, ConAgra touts that its canned tomato products contain  
19 antioxidants such as Lycopene. For example, the product label for Hunt's "Diced Tomatoes"  
20 currently states:  
21  
22  
23  
24  
25  
26  
27  
28



167. Until recently the label stated: "OUR PROMISE Our Tomatoes Are Always ... A natural source of Antioxidants –Vitamin C & Lycopene" or some very similar claim that the tomatoes were a "source" of Lycopene.

168. The product label for Swiss Miss Classics Milk Chocolate states that "Natural Antioxidants Are Found In Cocoa"



169. The Defendant also made claims that its Swiss Miss cocoa was a "source" of unnamed antioxidants.



1           170. Identical federal and California regulations regulate antioxidant claims as a  
2 particular type of nutrient content claim. Specifically, 21 C.F.R. § 101.54(g) contains special  
3 requirements for nutrient claims that use the term “antioxidant”:

4                   (1) the name of the antioxidant must be disclosed;

5                   (2) there must be an established RDI for that antioxidant, and if not, no  
6 “antioxidant” claim can be made about it;

7                   (3) the label claim must include the specific name of the nutrient that is an  
8 antioxidant and cannot simply say “antioxidants” (*e.g.*, “high in antioxidant vitamins C and E”),  
9 *see* 21 C.F.R. § 101.54(g)(4);

10                  (4) the nutrient that is the subject of the antioxidant claim must also have  
11 recognized antioxidant activity, *i.e.*, there must be scientific evidence that after it is eaten and  
12 absorbed from the gastrointestinal tract, the substance participates in physiological, biochemical  
13 or cellular processes that inactivate free radicals or prevent free radical-initiated chemical  
14 reactions, *see* 21 C.F.R. § 101.54(g)(2);

15                  (5) the antioxidant nutrient must meet the requirements for nutrient content claims  
16 in 21 C.F.R. § 101.54(b), (c), or (e) for “High” claims, “Good Source” claims, and “More”  
17 claims, respectively. For example, to use a “High” claim, the food would have to contain 20% or  
18 more of the Daily Reference Value (“DRV”) or RDI per serving. For a “Good Source” claim, the  
19 food would have to contain between 10-19% of the DRV or RDI per serving, *see* 21 C.F.R. §  
20 101.54(g)(3); and

21                  (6) the antioxidant nutrient claim must also comply with general nutrient content  
22 claim requirements such as those contained in 21 C.F.R. § 101.13(h) that prescribe the  
23 circumstances in which a nutrient content claim can be made on the label of products high in fat,  
24 saturated fat, cholesterol or sodium.

25           171. Defendant’s package labels for all canned tomato products currently represent that  
26 the antioxidant Lycopene is contained in the tomatoes and has until recently represented that the  
27 canned tomato products were a “source” of Lycopene. The antioxidant labeling for Defendant’s  
28 canned tomato products violates federal and California law.



172. The antioxidant claims on the packages of these products violate federal and California law: (1) because there are no RDIs for Lycopene, the antioxidant being touted, and (2) because Defendant lacks adequate scientific evidence that the claimed antioxidant nutrients participate in physiological, biochemical, or cellular processes that inactivate free radicals or prevent free radical-initiated chemical reactions after they are eaten and absorbed from the gastrointestinal tract.

173. The FDA has issued at least one warning letter relating to the use of a claim of a Lycopene claim for tomato products indicating that because “[t]here is no established reference value for Lycopene” a nutrient claim for Lycopene is unlawful. As such Lycopene cannot serve as the basis for the type of antioxidant claim made on the Hunt’s canned tomato products.

174. Similarly, ConAgra’s antioxidant claims on its Swiss Miss cocoa products are also unlawful and render the products misbranded because the labels simply represent that an unnamed antioxidant is contained in the cocoa:

(1) the name of the antioxidant is not disclosed;  
(2) there is no established RDI for that antioxidant;  
(3) the label claim does not include the specific name of the nutrient that is an antioxidant;

(4) the nutrient that is the subject of the antioxidant claim does not have recognized antioxidant activity, *i.e.*, there must be scientific evidence that after it is eaten and absorbed from the gastrointestinal tract, the substance participates in physiological, biochemical or cellular processes that inactivate free radicals or prevent free radical-initiated chemical reactions; and

(5) the antioxidant nutrient does not meet the requirements for nutrient content claims in 21 C.F.R. § 101.54(b), (c), or (e) for “High” claims, “Good Source” claims, and “More” claims, respectively.

175. In addition to the August 29, 2001 FDA letter sent to the Hirzel Canning Company described below (“Hirzel warning letter” attached hereto as Exhibit A), the FDA has issued at

1 least 6 other warning letters addressing similar unlawful antioxidant nutrient content claims.  
2 Defendant knew or should have known of these FDA warning letters.

3 176. Ignoring the legal requirements to make antioxidant claims about Lycopene and  
4 other antioxidants like the unnamed ones purportedly found in Swiss Miss cocoa as well as prior  
5 enforcement activity and relevant warning letters, the Defendant made multiple unlawful  
6 antioxidant claims about its tomato and cocoa products.

7 177. For example, the labels of Hunt's tomato products purchased by Plaintiffs have  
8 utilized two separate unlawful Lycopene antioxidant nutrient content claims. The first was a  
9 claim that the particular tomato product was a "natural source" of the antioxidant Lycopene. An  
10 example being "OUR PROMISE Our Tomatoes Are Always ... A natural source of Antioxidants  
11 -Vitamin C & Lycopene." The second was a claim that the antioxidant Lycopene was found  
12 naturally in tomatoes. An example being "OUR PROMISE Our Tomatoes Are Always ...The  
13 Antioxidants Vitamin C and Lycopene are found naturally in tomatoes. Both types of label claims  
14 are improper nutrient content claims.

15 178. This has been made clear by prior FDA enforcement actions targeting similar or  
16 identical claims. For example on March 24, 2011, the FDA sent Jonathan Sprouts, Inc. a warning  
17 letter where it specifically targeted a "source" type claim like the one used on Defendant's tomato  
18 products. In that letter the FDA stated:

19 Your Organic Clover Sprouts product label bears the claim "Phytoestrogen Source[.]"  
20 Your webpage entitled "Sprouts, The Miracle Food! - Rich in Vitamins, Minerals and  
21 Phytochemicals" bears the claim "Alfalfa sprouts are one of our finest food sources of . . .  
22 saponin." These claims are nutrient content claims subject to section 403(r)(1)(A) of the  
23 Act because they characterize the level of nutrients of a type required to be in nutrition  
24 labeling (phytoestrogen and saponin) in your products by use of the term "source." Under  
25 section 403(r)(2)(A) of the Act, nutrient content claims may be made only if the  
26 characterization of the level made in the claim uses terms which are defined by regulation.  
27 However, FDA has not defined the characterization "source" by regulation. Therefore,  
28 this characterization may not be used in nutrient content claims.

26 179. It is thus clear that a "source" claim like the one utilized on the labels of Hunt's  
27 tomato products such as those purchased by Plaintiffs are unlawful because the "FDA has not  
28 defined the characterization 'source' by regulation" and thus such a "characterization may not be

1 used in nutrient content claims.” Similarly, a claim that the nutrient Lycopene is “found” in  
2 tomatoes is improper because it is either an undefined characterization that a nutrient is found in a  
3 food at some undefined level or because it is a synonym for a defined term like “contains” as  
4 there is no difference in meaning between the statement “tomatoes contain Lycopene” and the  
5 statement “Lycopene is found in tomatoes.” Both characterize the fact the tomatoes contain  
6 Lycopene at some undefined level.

7 180. The Defendant made similar unlawful antioxidant claims on the labels of its Swiss  
8 Miss cocoa products claiming that unnamed antioxidants were found in cocoa. It also claimed that  
9 Swiss Miss cocoa was a “source” of unnamed antioxidants.

10 181. Plaintiffs relied on these unlawful antioxidant nutrient content claims when  
11 making their purchase decisions and were misled because they erroneously believed the implicit  
12 misrepresentation that the tomato and cocoa products they were purchasing met the minimum  
13 nutritional threshold to make such antioxidant claims. This threshold represents the lowest level  
14 that a nutrient can be present in a food before it becomes deceptive and misleading to highlight its  
15 presence in a nutrient content claim. Plaintiffs would not have purchased these products had they  
16 known that the tomatoes and cocoa did not in fact satisfy such minimum nutritional requirements  
17 with regard to Lycopene and unnamed antioxidants. Plaintiffs had other alternatives that lacked  
18 such ingredients and Plaintiff also had cheaper alternatives.

19 182. For these reasons, Defendant’s antioxidant claims at issue in this Complaint are  
20 false and misleading and in violation of 21 C.F.R. § 101.54 and California law, and the products  
21 at issue are misbranded as a matter of law. Misbranded products cannot be legally manufactured,  
22 advertised, distributed, held or sold, and are legally worthless.

23 **8. Defendant Violates California Law By Making Unlawful Fresh Claims On Its**  
24 **Products’ Labels**

25 183. California law regulates the use of the word “fresh” in connection with food.  
26 Pursuant to 21 C.F.R. § 101.95 which has been adopted by the State of California:

27 the word “fresh,” when used on the label or in labeling of a food in a manner that suggests  
28 or implies that the food is unprocessed, means that the food is in its raw state and has not

1        been frozen or subjected to any form of thermal processing or any other form of preservation.  
2        The restrictions on the use of the term “fresh” “pertain to any use of the subject terms .... in a  
3        brand name and use as a sensory modifier” such as “fresh taste.”

4        184.    The Defendant violates this provision by representing that its Misbranded Food  
5        Products are fresh or have a fresh taste when they have been thermally processed, preserved and  
6        contain chemical preservatives.

7        185.    For example, the label of Hunt’s canned tomato products like the diced tomatoes  
8        purchased by Plaintiffs bear a FlashSteam Freshness symbol that appears to depict a raw  
9        unskinned tomato with beads of water on it. Hunt’s claims that:

10        Only Hunt’s tomatoes are peeled with FlashSteam, our proprietary natural steam  
11        process that maintains the natural tomato goodness of every tomato in our Diced,  
12        Whole, and Stewed varieties. Some brands peel their tomatoes using lye or other  
13        harsh chemicals. FlashSteam, however, is a process that's completely chemical-  
14        free—our Diced, Whole, and Stewed tomatoes are treated to nothing more harsh  
15        than a steam treatment.

16        186.    Given the thermal processing other than the FlashSteam process and the  
17        preservation of Hunt’s canned tomatoes and the addition of the chemical preservatives, citric acid  
18        and calcium chloride, to the canned tomatoes, the use of the FlashSteam Freshness symbol and  
19        the claim that the tomato products have a “fresh taste” is deceptive and misleading.

20        187.    Notwithstanding the claim that the process is “completely chemically free” at  
21        some point in the process the chemicals citric acid and calcium chloride are introduced to the  
22        tomato products. Given the addition of the preservatives and chemicals the “completely chemical  
23        free” claim is deceptive and misleading.

24        188.    Despite the legal prohibition against doing so Hunt’s repeatedly claims that its  
25        tomato products have a “fresh taste.” For example, Hunt’s website describes the “vine-ripened  
26        fresh taste of Hunt's tomatoes.”

27        189.    Moreover, Hunt’s also asserts:  
28

1 For diced, whole and stewed tomatoes, Hunt's unique flash-steam process helps  
2 keep in the flavor and color of tomatoes picked at their peak of ripeness. This  
allows Hunt's varieties to deliver the high nutritional profile and fresh taste that  
3 canned tomatoes consumers desire.

4 190. This use of the term "fresh taste" despite thermal processing, preservation and the  
chemicals that are added to the tomato products by Hunt's is deceptive and misleading for the  
5 reasons stated above. Not surprisingly, the National Advertising Division of the Council of  
6 Better Business Bureaus has determined that ConAgra Foods should discontinue certain of its  
7 tomato related claims because in connection with the term "100% Natural" they might falsely  
8 leave consumers with the impression that Hunt's tomato products were prepared from fresh  
9 unprocessed ingredients.

10 191. A reasonable consumer would expect that when the Defendant made a  
11 representation on its products' labels that such products had a "fresh taste" or made  
12 representations as to its freshness that such a representations were not contrary to regulatory  
13 requirement for making such claims, A reasonable consumer would also expect that when a  
14 manufacturer represented that its vegetable products were fresh that those vegetable products  
15 were fresh and had not been chemically preserved or subjected to processes inconsistent with a  
16 freshness claim.

17 192. Plaintiffs saw and relied on Defendant's label representation of freshness and its  
18 other representations of freshness and fresh taste and they based their purchasing decisions in part  
19 on the belief that such products were fresh, would have a fresh taste and had not been subjected to  
20 chemical preservation or processes inconsistent with a freshness claim.

21 193. Plaintiffs did not know, and had no reason to know, that Defendant's canned  
22 tomato products contained chemical preservatives and had undergone processes inconsistent with  
23 a freshness claim because the Defendant made false representations of freshness on its label and  
24 labeling of its products. Moreover, as discussed above, the Defendant falsely represented that its  
25 canned tomato products were "free of artificial ingredients & preservatives" and 2) failed to  
26 disclose those chemical preservatives and artificial ingredients as required by California and  
27 federal law.

28

194. Consumers are thus misled into purchasing Defendant's products with false and misleading labeling statements and ingredient descriptions, which violate California law and the regulations related to claims related to freshness contained in 21 C.F.R. §§ 101.95 which has been adopted as law by California..

195. Had Plaintiffs been aware that the Misbranded Food Products they purchased contained chemical preservatives and artificial ingredients and thus were not truly fresh as falsely represented they would not have purchased the products. Plaintiffs had other alternatives that lacked such ingredients and Plaintiff also had cheaper alternatives.

196. Because of their false label representations about freshness Defendant's Misbranded Food Products are in this respect misbranded under identical federal and California law. Misbranded products cannot be legally sold and are legally worthless. Plaintiffs and members of the Class who purchased these products paid an unwarranted premium for these products.

#### **9. Defendant Makes Unlawful Health Claims**

197. The Defendant violated identical California and federal law by making numerous unapproved health claims about its tomato products. It also violated identical California and federal law by making numerous unapproved claims about the ability of its tomato products to cure, mitigate, treat and prevent various diseases that render its products unapproved drugs under California and federal law. Moreover, in promoting the ability of its tomato products to have an effect on certain diseases such as cancer, diabetes, high blood pressure, heart and vascular disease and asthma among others, Defendant violated the advertising provisions of the Sherman law.

198. A health claim is a statement expressly or implicitly linking the consumption of a food substance (*e.g.*, ingredient, nutrient, or complete food) to risk of a disease (*e.g.*, cardiovascular disease) or a health-related condition (*e.g.*, hypertension). *See* 21 C.F.R. § 101.14(a)(1), (a)(2), and (a)(5). Only health claims made in accordance with FDCA requirements, or authorized by FDA as qualified health claims, may be included in food labeling. Other express or implied statements that constitute health claims, but that do not meet statutory requirements, are prohibited in labeling foods.

199. 21 C.F.R. § 101.14, which has been expressly adopted by California, provides when and how a manufacturer may make a health claim about its product. A “Health Claim” means any claim made on the label or in labeling of a food, including a dietary supplement, that expressly or by implication, including “third party” references, written statements (*e.g.*, a brand name including a term such as “heart”), symbols (*e.g.*, a heart symbol), or vignettes, characterizes the relationship of any substance to a disease or health-related condition. Implied health claims include those statements, symbols, vignettes, or other forms of communication that suggest, within the context in which they are presented, that a relationship exists between the presence or level of a substance in the food and a disease or health-related condition (*see* 21 CFR § 101.14(a)(1)).

200. Further, health claims are limited to claims about disease risk reduction, and cannot be claims about the diagnosis, cure, mitigation, or treatment of disease. An example of an authorized health claim is: “Three grams of soluble fiber from oatmeal daily in a diet low in saturated fat and cholesterol may reduce the risk of heart disease. This cereal has 2 grams per serving.”

201. A claim that a substance may be used in the diagnosis, cure, mitigation, treatment, or prevention of a disease is a drug claim and may not be made for a food. 21 U.S.C. § 321(g)(1)(D).

202. For example, ConAgra specifically promotes the antioxidant health benefits of its tomato-based canned products. ConAgra maintains the website <http://www.conagrafoodscienceinstitute.com>, which contains statements such as:

Antioxidant properties lend tomatoes toward lowering risk for a number of chronic diseases and improving health status overall.

203. This website also contains material such as a ConAgra’s tomato “superfood” webinar where ConAgra, like the snake oil salesmen of yore with their cure-all elixirs, promotes the ability of the Lycopene in its tomato products to prevent cancer, osteoporosis, asthma, cardiovascular disease, diabetes, psoriasis, erythema, premature skin aging, sun damage,



dementia, Alzheimer's disease, Parkinson's disease, and mild cognitive impairment and to promote "brain health," "bone health," "skin health," and "body weight control."

204. ConAgra also has issued press releases and other marketing materials touting the healthy nature of its canned tomato products, including that tomatoes "may have a measurable impact on heart disease prevention" and contribute to "a significant decrease in blood pressure." <http://media.conagrafoods.com/phoenix.zhtml?c=202310&p=irol-newsArticle&ID=1494219&highlight>.

205. In addition to its product labels,, press releases and website claims, ConAgra has also aggressively sought out other mediums to disseminate its unapproved tomato related health and nutrient claims such as paid bloggers who are given talking points and material as well as the ability to incorporate or link to material like the webinar thus resulting in ConAgra's unapproved claims being widely advertised on places such as the web where they are viewed by consumers such as Plaintiffs who saw such claims and relied on Defendant's health claims which influenced their decision to purchase Defendant's tomato products. Plaintiff's would not have bought the products had they known the Defendant's claims were unapproved and that the products were thus misbranded.

206. Plaintiffs were misled into the belief that such claims were legal and had passed passed regulatory muster and were supported by science capable of securing regulatory acceptance. Because this was not the case the Plaintiffs were deceived.

207. These materials and advertisements not only violate regulations adopted by California such as 21 C.F.R. § 101.14 they also violate California Health & Safety Code § 110403 which prohibits the advertisement of products that are represented to have any effect on enumerated conditions, disorders and diseases including cancer, diabetes, heart and vascular diseases, high blood pressure, unless it has federal approval.

208. Because of Defendant's unlawful unapproved claims about its tomato products, the tomato products are in this respect misbranded under identical federal and California law. Misbranded products cannot be legally sold and are legally worthless. Plaintiffs and members of the Class who purchased these products paid an unwarranted premium for these products.

1 Plaintiffs had other alternatives that lacked such ingredients and Plaintiff also had cheaper  
2 alternatives.

3 **D. Defendant Has Violated California Law**

4 209. Defendant has manufactured, advertised, distributed and sold products that are  
5 misbranded under California law. Misbranded products cannot be legally manufactured,  
6 advertised, distributed, or sold or held and are legally worthless as a matter of law.

7 210. Defendant has violated California Health & Safety Code §§ 109885 and 110390  
8 which make it unlawful to disseminate false or misleading food advertisements that include  
9 statements on products and product packaging or labeling or any other medium used to directly or  
10 indirectly induce the purchase of a food product.

11 211. Defendant has violated California Health & Safety Code § 110395 which makes it  
12 unlawful to manufacture, sell, deliver, hold or offer to sell any misbranded food.

13 212. Defendant has violated California Health & Safety Code § 110398 which makes it  
14 unlawful to deliver or proffer for delivery any food that has been falsely advertised.

15 213. Defendant's Misbranded Food Products are misbranded under California Health &  
16 Safety Code § 110660 because their labeling is false and misleading in one or more ways.

17 214. Defendant's Misbranded Food Products are misbranded under California Health &  
18 Safety Code § 110665 because their labeling fails to conform to the requirements for nutrient  
19 labeling set forth in 21 U.S.C. § 343(q) and the regulations adopted thereto.

20 215. Defendant's Misbranded Food Products are misbranded under California Health &  
21 Safety Code § 110670 because their labeling fails to conform with the requirements for nutrient  
22 content and health claims set forth in 21 U.S.C. § 343(r) and the regulations adopted thereto.

23 216. Defendant's Misbranded Food Products are misbranded under California Health &  
24 Safety Code § 110705 because words, statements and other information required by the Sherman  
25 Law to appear on its labeling either are missing or not sufficiently conspicuous

26 217. Defendant's Misbranded Food Products are misbranded under California Health  
27 & Safety Code § 110725 because they fail to bear labels clearly stating the common or usual  
28 name of each ingredient they contain.

1           218. Defendant's Misbranded Food Products are misbranded under California Health &  
2 Safety Code § 110740 because they contain artificial flavoring, artificial coloring and chemical  
3 preservatives but fail to adequately disclose that fact on their labeling.

4           219. Defendant has violated California Health & Safety Code § 110760 which makes it  
5 unlawful for any person to manufacture, sell, deliver, hold, or offer for sale any food that is  
6 misbranded.

7           220. Defendant has violated California Health & Safety Code § 110765 which makes it  
8 unlawful for any person to misbrand any food.

9           221. Defendant has violated California Health & Safety Code § 110770 which makes it  
10 unlawful for any person to receive in commerce any food that is misbranded or to deliver or  
11 proffer for delivery any such food.

12           222. Defendant has violated California Health & Safety Code §§ 110820, 110830, and  
13 110890 which make it unlawful for any person to sell, offer for sale, advertise or label products  
14 in violation of the organic provisions of the Sherman Law and the federal requirements it adopts  
15 and incorporates by reference.

16           223. Defendant has violated the standard set by 21 C.F.R. § 101.2, 101.4, 101.22 and  
17 102.5 all of which have been adopted and incorporated by reference in the Sherman Law, by  
18 failing to include on their product labels the nutritional information required by law.

19           224. Defendant has violated the standards set by 21 CFR §§ 101.13, 101.14, 101.54,  
20 101.65 and 101.95 which have been adopted and incorporated by reference in the Sherman Law,  
21 by including unauthorized antioxidant and nutrient content and fresh claims on their products.

22 **E. Plaintiffs Purchased Defendant's Misbranded Food Products**

23           225. Plaintiffs care about the nutritional content of food and seek to maintain a healthy  
24 diet.

25           226. Plaintiffs purchased Defendant's Misbranded Food Products at issue in this  
26 Complaint, including Hunt's canned tomatoes products, PAM cooking spray, and Swiss Miss  
27 cocoa, since April of 2008, and throughout the Class Period.  
28

1           227. Plaintiffs purchased Defendant's Misbranded Food Products, including Hunt's  
2 Petite Diced Tomatoes in a 14.5 oz. can and other Hunt's canned tomato products such as its  
3 tomato paste in an 8 oz can.

4 ///

5 ///

6 ///

7 ///

8 ///

9 ///

10 ///

11 ///

12 ///

13 ///

14 ///

15 ///

16 ///

17 ///

18 ///

19 ///

20 ///

21 ///

22 ///

23 ///

24 ///

25 ///

26 ///

27 ///

28 ///





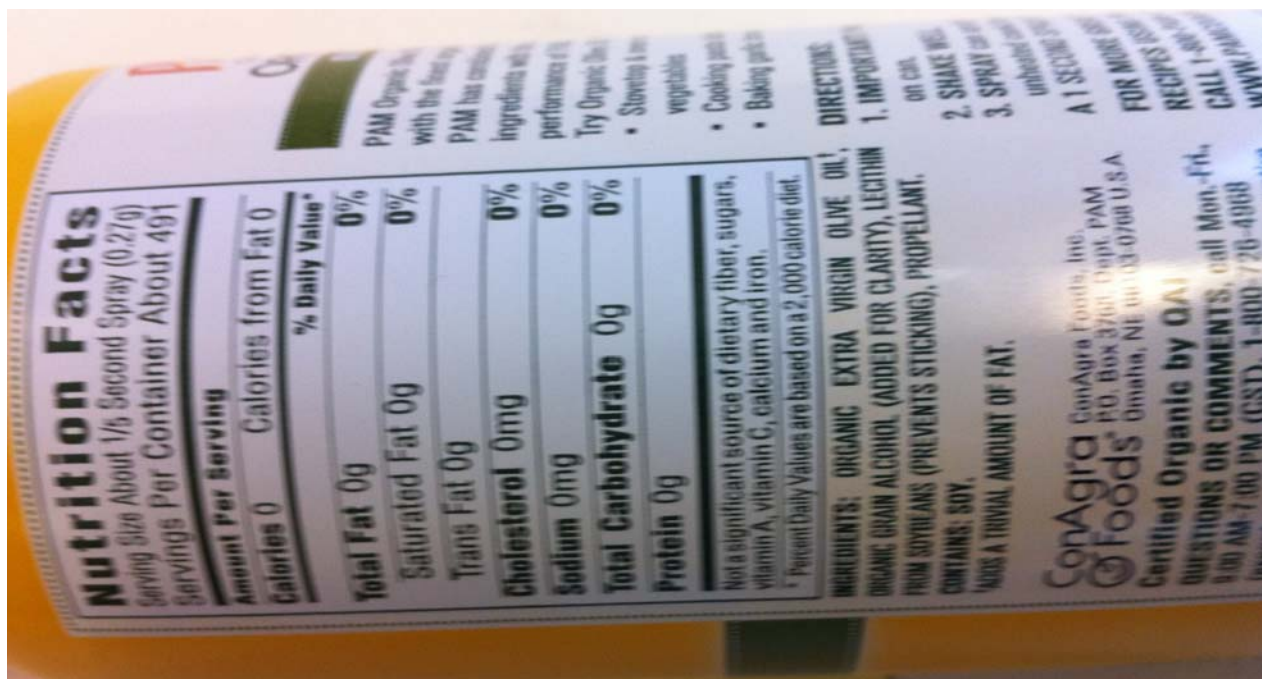




228. Plaintiffs purchased 100% Natural PAM Original cooking spray in a 12 oz. can. They also purchased 100% Natural PAM Certified Organic Olive Oil Cooking spray in a 5 oz. can.



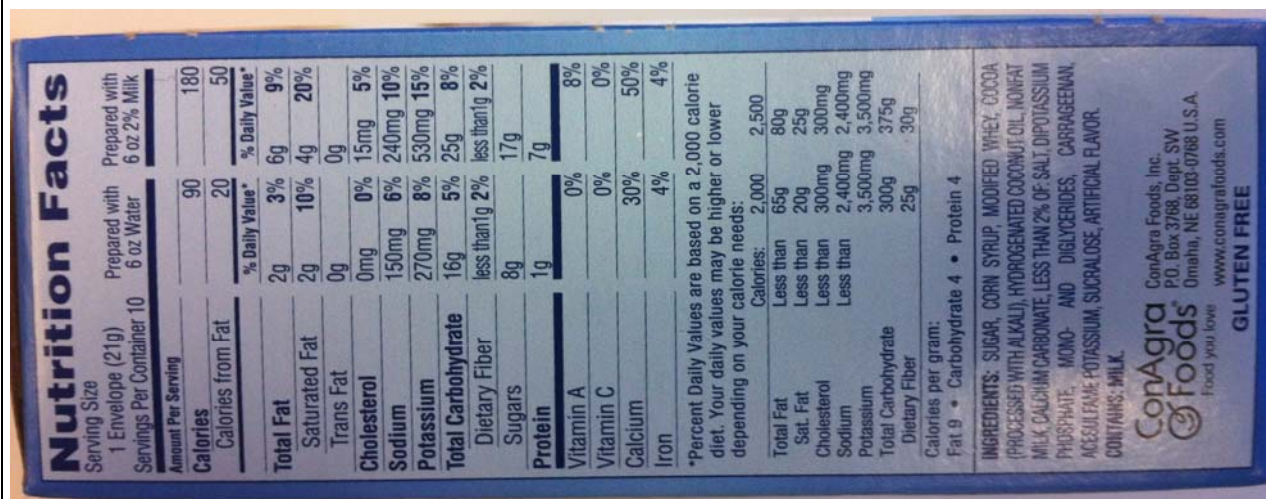




229. Plaintiffs purchased Swiss Miss Classics Milk Chocolate cocoa in a 7.3 oz. box.







230. Plaintiffs read the labels on Defendant's Misbranded Food Products, including the "100% Natural" claims; the "Organic" claims, the Lycopene antioxidant nutrient content claim; the "free of artificial ingredients & preservatives" claim; the ingredient claims and the FlashSteam freshness claim before purchasing them.

231. Plaintiffs read Defendant’s website and web claims concerning Defendant’s Misbranded Food Products, including the “100% Natural” claims; the “Organic” claims, the Lycopene antioxidant nutrient content claim; the “free of artificial ingredients & preservatives”

1 claim, the nutrient content claims related to potassium and Lycopene, the antioxidant claims  
2 related to Lycopene, the health and disease related claims about tomatoes, and the freshness and  
3 “fresh taste” claims related to tomatoes before purchasing them.

4 232. Plaintiffs reasonably relied on Defendant’s package labeling, website and web  
5 claims, including the “100% Natural” claims; the “Organic” claims, the Lycopene antioxidant  
6 nutrient content claim; the “free of artificial ingredients & preservatives” claim, the nutrient  
7 content claims related to potassium and Lycopene, the antioxidant claims related to Lycopene, the  
8 health and disease related claims about tomatoes, and the freshness and fresh taste claims related  
9 to tomatoes

10 233. At point of sale, Plaintiffs did not know, and had no reason to know, that  
11 Defendant’s products were misbranded as set forth herein, and would not have bought the  
12 products had they known the truth about them.

13 234. At point of sale, Plaintiffs did not know, and had no reason to know, that  
14 Defendant’s “100% Natural” claims; “Organic” claims, Lycopene antioxidant nutrient content  
15 claim; “free of artificial ingredients & preservatives” claim; and FlashSteam freshness claim on  
16 the products’ labels or Defendant’s website and web claims were unlawful as set forth herein, and  
17 would not have bought the products had they known the truth about them.

18 235. After Plaintiffs learned that Defendant’s Misbranded Food Products are falsely  
19 labeled, they stopped purchasing them.

20 236. As a result of Defendant’s misrepresentations, Plaintiffs and thousands of others in  
21 California purchased the products at issue.

22 237. Defendant’s labeling, advertising, and marketing as alleged herein is false and  
23 misleading and designed to increase sales of the products at issue. Defendant’s  
24 misrepresentations are part of an extensive labeling, advertising and marketing campaign, and a  
25 reasonable person would attach importance to Defendant’s representations in determining  
26 whether to purchase the products at issue.

27 238. A reasonable person would attach importance to whether Defendant’s products  
28 were legally salable and capable of legal possession and to Defendant’s representations about

these issues in determining whether to purchase the products at issue. Plaintiffs would not have purchased Defendant's Misbranded Food Products had they known they were not capable of being legally sold or held.

239. These Misbranded Food Products 1) whose essential characteristics had been misrepresented by the Defendant; 2) which contained ingredients the Plaintiffs sought to avoid in their food; 3) which had their nutritional and health benefits misrepresented and overstated by the Defendant, and 4) which were misbranded products which could not be resold and whose very possession was illegal; were worthless to the Plaintiffs and as a matter of law.

### **CLASS ACTION ALLEGATIONS**

240. Plaintiffs bring this action as a class action pursuant to Federal Rule of Civil Procedure 23(b)(2) and 23(b)(3) on behalf of the following class:

All persons in California who, within the last four years, purchased a PAM cooking spray product, or a Hunt's canned tomato product, or a Swiss Miss Cocoa product (the "Class").

241. The following persons are expressly excluded from the Class: (1) Defendant and its subsidiaries and affiliates; (2) all persons who make a timely election to be excluded from the proposed Class; and (3) governmental entities; and (4) the Court to which this case is assigned and its staff.

242. This action can be maintained as a class action because there is a well-defined community of interest in the litigation and the proposed Class is easily ascertainable.

243. Numerosity: Based upon Defendant's publicly available sales data with respect to the misbranded products at issue, it is estimated that the Class numbers in the thousands, and that joinder of all Class members is impracticable.

244. Common Questions Predominate: This action involves common questions of law and fact applicable to each Class member that predominate over questions that affect only individual Class members. Thus, proof of a common set of facts will establish the right of each Class member to recover. Questions of law and fact common to each Class member include, for example:

- a. Whether Defendant engaged in unfair, unlawful or deceptive

business practices by failing to properly package and label their Misbranded Food Products sold to consumers;

- b. Whether the food products at issue were misbranded or unlawfully packaged and labeled as a matter of law;
- c. Whether Defendant made unlawful and misleading antioxidant claims with respect to their food products sold to consumers;
- d. Whether Defendant made unlawful and misleading nutrient content claims with respect to their food products sold to consumers;
- e. Whether Defendant made unlawful and misleading “100% Natural” claims with respect to their food products sold to consumers;
- f. Whether Defendant made unlawful and misleading “Organic” claims with respect to their food products sold to consumers;
- g. Whether Defendant failed to list ingredients by their common or usual names or to list ingredients in descending order by weight;
- h. Whether Defendant failed to disclose the presence of preservatives or falsely represented that products did not contain preservatives or artificial ingredients;
- i. Whether Defendant made unlawful and misleading fresh claims;
- j. Whether Defendant violated California Bus. & Prof. Code § 17200 *et seq.*, California Bus. & Prof. Code § 17500 *et seq.*, the Consumer Legal Remedies Act, Cal. Civ. Code. § 1750 *et seq.*, and the Sherman Law;
- k. Whether Plaintiffs and the Class are entitled to equitable and/or injunctive relief;
- l. Whether Defendant’s unlawful, unfair and/or deceptive practices harmed Plaintiffs and the Class; and
- m. Whether Defendant was unjustly enriched by its deceptive practices.

245. Typicality: Plaintiffs’ claims are typical of the claims of the Class because Plaintiffs bought Defendant’s Misbranded Food Products during the Class Period. Defendant’s unlawful, unfair and/or fraudulent actions concern the same business practices described herein irrespective of where they occurred or were experienced. Plaintiffs and the Class sustained similar injuries arising out of Defendant’s conduct in violation of California law. The injuries of each member of the Class were caused directly by Defendant’s wrongful conduct. In addition, the factual underpinning of Defendant’s misconduct is common to all Class members and



1 represents a common thread of misconduct resulting in injury to all members of the Class.  
2 Plaintiffs' claims arise from the same practices and course of conduct that give rise to the claims  
3 of the Class members and are based on the same legal theories.

4 246. Adequacy: Plaintiffs will fairly and adequately protect the interests of the Class.  
5 Neither Plaintiffs nor Plaintiffs' counsel have any interests that conflict with or are antagonistic to  
6 the interests of the Class members. Plaintiffs have retained highly competent and experienced  
7 class action attorneys to represent their interests and those of the members of the Class. Plaintiffs  
8 and Plaintiffs' counsel have the necessary financial resources to adequately and vigorously  
9 litigate this class action, and Plaintiffs and counsel are aware of their fiduciary responsibilities to  
10 the Class members and will diligently discharge those duties by vigorously seeking the maximum  
11 possible recovery for the Class.

12 247. Superiority: There is no plain, speedy or adequate remedy other than by  
13 maintenance of this class action. The prosecution of individual remedies by members of the  
14 Class will tend to establish inconsistent standards of conduct for Defendant and result in the  
15 impairment of Class members' rights and the disposition of their interests through actions to  
16 which they were not parties. Class action treatment will permit a large number of similarly  
17 situated persons to prosecute their common claims in a single forum simultaneously, efficiently  
18 and without the unnecessary duplication of effort and expense that numerous individual actions  
19 would engender. Further, as the damages suffered by individual members of the Class may be  
20 relatively small, the expense and burden of individual litigation would make it difficult or  
21 impossible for individual members of the Class to redress the wrongs done to them, while an  
22 important public interest will be served by addressing the matter as a class action. Class  
23 treatment of common questions of law and fact would also be superior to multiple individual  
24 actions or piecemeal litigation in that class treatment will conserve the resources of the Court and  
25 the litigants, and will promote consistency and efficiency of adjudication.

26 248. The prerequisites to maintaining a class action for injunctive or equitable relief  
27 pursuant to Fed. R. Civ. P. 23(b)(2) are met as Defendant has acted or refused to act on grounds  
28

generally applicable to the Class, thereby making appropriate final injunctive or equitable relief with respect to the Class as a whole.

249. The prerequisites to maintaining a class action pursuant to Fed. R. Civ. P. 23(b)(3) are met as questions of law or fact common to class members predominate over any questions affecting only individual members, and a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.

250. Plaintiffs and Plaintiffs' counsel are unaware of any difficulties that are likely to be encountered in the management of this action that would preclude its maintenance as a class action.

### **CAUSES OF ACTION**

#### **FIRST CAUSE OF ACTION**

#### **Business and Professions Code § 17200, *et seq.* Unlawful Business Acts and Practices**

251. Plaintiffs incorporate by reference each allegation set forth above.

252. Defendant's conduct constitutes unlawful business acts and practices.

253. Defendant sold Misbranded Food Products in California during the Class Period.

254. Defendant is a corporation and, therefore, is a "person" within the meaning of the Sherman Law.

255. Defendant's business practices are unlawful under § 17200, *et seq.* by virtue of Defendant's violations of the advertising provisions of the Sherman Law (Article 3) and the misbranded food provisions of the Sherman Law (Article 6).

256. Defendant's business practices are unlawful under § 17200, *et seq.* by virtue of Defendant's violations of § 17500, *et seq.*, which forbids untrue and misleading advertising.

257. Defendant's business practices are unlawful under § 17200, *et seq.* by virtue of Defendant's violations of the Consumer Legal Remedies Act, Cal. Civ. Code. § 1750 *et seq.*

258. Defendant sold Plaintiffs and the Class Misbranded Food Products that were not capable of being sold or held legally and which were legally worthless. Plaintiffs and the Class paid a premium price for the Misbranded Food Products.



1           259. As a result of Defendant's illegal business practices, Plaintiffs and the Class,  
2 pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future  
3 conduct and such other orders and judgments which may be necessary to disgorge Defendant's  
4 ill-gotten gains and to restore to any Class Member any money paid for the Misbranded Food  
5 Products.

6           260. Defendant's unlawful business acts present a threat and reasonable continued  
7 likelihood of injury to Plaintiffs and the Class.

8           261. As a result of Defendant's conduct, Plaintiffs and the Class, pursuant to Business  
9 and Professions Code § 17203, are entitled to an order enjoining such future conduct by  
10 Defendant, and such other orders and judgments which may be necessary to disgorge Defendant's  
11 ill-gotten gains and restore any money paid for Defendant's Misbranded Food Products by  
12 Plaintiffs and the Class.

13  
14                               **SECOND CAUSE OF ACTION**  
15                               **Business and Professions Code § 17200, *et seq.***  
                                  **Unfair Business Acts and Practices**

16           262. Plaintiffs incorporate by reference each allegation set forth above.

17           263. Defendant's conduct as set forth herein constitutes unfair business acts and  
18 practices.

19           264. Defendant sold Misbranded Food Products in California during the Class Period.

20           265. Plaintiffs and members of the Class suffered a substantial injury by virtue of  
21 buying Defendant's Misbranded Food Products that they would not have purchased absent  
22 Defendant's illegal conduct as set forth herein.

23           266. Defendant's deceptive marketing, advertising, packaging and labeling of its  
24 Misbranded Food Products and its sale of unsalable Misbranded Food Products that were illegal  
25 to possess was of no benefit to consumers, and the harm to consumers and competition is  
26 substantial.

1           267. Defendant sold Plaintiffs and the Class Misbranded Food Products that were not  
2 capable of being legally sold or held and that were legally worthless. Plaintiffs and the Class paid  
3 a premium price for the Misbranded Food Products.

4           268. Plaintiffs and the Class who purchased Defendant's Misbranded Food Products  
5 had no way of reasonably knowing that the products were misbranded and were not properly  
6 marketed, advertised, packaged and labeled, and thus could not have reasonably avoided the  
7 injury each of them suffered.

8           269. The consequences of Defendant's conduct as set forth herein outweighs any  
9 justification, motive or reason therefor. Defendant's conduct is and continues to be illegal and  
10 contrary to public policy, and is substantially injurious to Plaintiffs and the Class.

11           270. As a result of Defendant's conduct, Plaintiffs and the Class, pursuant to Business  
12 and Professions Code § 17203, are entitled to an order enjoining such future conduct by  
13 Defendant, and such other orders and judgments which may be necessary to disgorge Defendant's  
14 ill-gotten gains and restore any money paid for Defendant's Misbranded Food Products by  
15 Plaintiffs and the Class.

16                                   **THIRD CAUSE OF ACTION**  
17                                   **Business and Professions Code § 17200, *et seq.***  
18                                   **Fraudulent Business Acts and Practices**

19           271. Plaintiffs incorporate by reference each allegation set forth above.

20           272. Defendant's conduct as set forth herein constitutes fraudulent business practices  
21 under California Business and Professions Code sections § 17200, *et seq.*

22           273. Defendant sold Misbranded Food Products in California during the Class Period.

23           274. Defendant's misleading marketing, advertising, packaging and labeling of the  
24 Misbranded Food Products and misrepresentation that the products were salable, capable of legal  
25 possession and not misbranded was likely to deceive reasonable consumers, and in fact, Plaintiffs  
26 and members of the Class were deceived. Defendant has engaged in fraudulent business acts and  
27 practices.  
28

275. Defendant's fraud and deception caused Plaintiffs and the Class to purchase Defendant's Misbranded Food Products that they would otherwise not have purchased had they known the true nature of those products.

276. Defendant sold Plaintiffs and the Class Misbranded Food Products that were not capable of being sold or held legally and that were legally worthless. Plaintiffs and the Class paid a premium price for the Misbranded Food Products.

277. As a result of Defendant's conduct as set forth herein, Plaintiffs and the Class, pursuant to Business and Professions Code § 17203, are entitled to an order enjoining such future conduct by Defendant, and such other orders and judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore any money paid for Defendant's Misbranded Food Products by Plaintiffs and the Class.

**FOURTH CAUSE OF ACTION**  
**Business and Professions Code § 17500, *et seq.***  
**Misleading and Deceptive Advertising**

278. Plaintiffs incorporate by reference each allegation set forth above.

279. Plaintiffs asserts this cause of action for violations of California Business and Professions Code § 17500, *et seq.* for misleading and deceptive advertising against Defendant.

280. Defendant sold Misbranded Food Products in California during the Class Period.

281. Defendant engaged in a scheme of offering Misbranded Food Products for sale to Plaintiffs and members of the Class by way of, *inter alia*, product packaging and labeling, and other promotional materials. These materials misrepresented and/or omitted the true contents and nature of Defendant's Misbranded Food Products. Defendant's advertisements and inducements were made within California and come within the definition of advertising as contained in Business and Professions Code §17500, *et seq.* in that such product packaging and labeling, and promotional materials were intended as inducements to purchase Defendant's Misbranded Food Products and are statements disseminated by Defendant to Plaintiffs and the Class that were intended to reach members of the Class. Defendant knew that these statements were misleading and deceptive as set forth herein.

1           282. In furtherance of its plan and scheme, Defendant prepared and distributed within  
2 California and nationwide via product packaging and labeling, and other promotional materials,  
3 statements that misleadingly and deceptively represented the ingredients contained in and the  
4 nature of Defendant's Misbranded Food Products. Plaintiffs and the Class necessarily and  
5 reasonably relied on Defendant's materials, and were the intended targets of such representations.

6           283. Defendant's conduct in disseminating misleading and deceptive statements in  
7 California and nationwide to Plaintiffs and the Class was and is likely to deceive reasonable  
8 consumers by obfuscating the true ingredients and nature of Defendant's Misbranded Food  
9 Products in violation of the "misleading prong" of California Business and Professions Code §  
10 17500, *et seq.*

11           284. As a result of Defendant's violations of the "misleading prong" of California  
12 Business and Professions Code § 17500, *et seq.*, Defendant has been unjustly enriched at the  
13 expense of Plaintiffs and the Class. Misbranded products cannot be legally sold or held and are  
14 legally worthless. Plaintiffs and the Class paid a premium price for the Misbranded Food  
15 Products.

16           285. Plaintiffs and the Class, pursuant to Business And Professions Code § 17535, are  
17 entitled to an order enjoining such future conduct by Defendant, and such other orders and  
18 judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore any  
19 money paid for Defendant's Misbranded Food Products by Plaintiffs and the Class.

20  
21                           **FIFTH CAUSE OF ACTION**  
22                           **Business and Professions Code § 17500, *et seq.***  
                              **Untrue Advertising**

23           286. Plaintiffs incorporate by reference each allegation set forth above.

24           287. Plaintiffs asserts this cause of action against Defendant for violations of California  
25 Business and Professions Code § 17500, *et seq.*, regarding untrue advertising.

26           288. Defendant sold Misbranded Food Products in California during the Class Period.

27           289. Defendant engaged in a scheme of offering Misbranded Food Products for sale to  
28 Plaintiffs and the Class by way of product packaging and labeling, and other promotional

1 materials. These materials misrepresented and/or omitted the true contents and nature of  
2 Defendant's Misbranded Food Products. Defendant's advertisements and inducements were  
3 made in California and come within the definition of advertising as contained in Business and  
4 Professions Code §17500, *et seq.* in that the product packaging and labeling, and promotional  
5 materials were intended as inducements to purchase Defendant's Misbranded Food Products, and  
6 are statements disseminated by Defendant to Plaintiffs and the Class. Defendant knew that these  
7 statements were untrue.

8 290. In furtherance of their plan and scheme, Defendant prepared and distributed in  
9 California and nationwide via product packaging and labeling, and other promotional materials,  
10 statements that falsely advertise the ingredients contained in Defendant's Misbranded Food  
11 Products, and falsely misrepresented the nature of those products. Plaintiffs and the Class were  
12 the intended targets of such representations and would reasonably be deceived by Defendant's  
13 materials.

14 291. Defendant's conduct in disseminating untrue advertising throughout California and  
15 nationwide deceived Plaintiffs and members of the Class by obfuscating the contents, nature and  
16 quality of Defendant's Misbranded Food Products in violation of the "untrue prong" of California  
17 Business and Professions Code § 17500.

18 292. As a result of Defendant's violations of the "untrue prong" of California Business  
19 and Professions Code § 17500, *et seq.*, Defendant has been unjustly enriched at the expense of  
20 Plaintiffs and the Class. Misbranded products cannot be legally sold or held and are legally  
21 worthless. Plaintiffs and the Class paid a premium price for the Misbranded Food Products.

22 293. Plaintiffs and the Class, pursuant to Business and Professions Code § 17535, are  
23 entitled to an order enjoining such future conduct by Defendant, and such other orders and  
24 judgments which may be necessary to disgorge Defendant's ill-gotten gains and restore any  
25 money paid for Defendant's Misbranded Food Products by Plaintiffs and the Class.

**SIXTH CAUSE OF ACTION**

**Consumers Legal Remedies Act, Cal. Civ. Code §1750, et seq.**

294. Plaintiffs incorporate by reference each allegation set forth above.

295. This cause of action is brought pursuant to the CLRA. Defendant's violations of the CLRA were and are willful, oppressive and fraudulent, thus supporting an award of punitive damages.

296. Plaintiffs and the Class are entitled to actual and punitive damages against Defendant for its violations of the CLRA. In addition, pursuant to Cal. Civ. Code § 1782(a)(2), Plaintiffs and the Class are entitled to an order enjoining the above-described acts and practices, providing restitution to Plaintiffs and the Class, ordering payment of costs and attorneys' fees, and any other relief deemed appropriate and proper by the Court pursuant to Cal. Civ. Code § 1780.

297. Defendant's actions, representations and conduct have violated, and continue to violate the CLRA, because they extend to transactions that are intended to result, or which have resulted, in the sale of goods or services to consumers.

298. Defendant sold Misbranded Food Products in California during the Class Period.

299. Plaintiffs and members of the Class are "consumers" as that term is defined by the CLRA in Cal. Civ. Code §1761(d).

300. Defendant's Misbranded Food Products were and are "goods" within the meaning of Cal. Civ. Code §1761(a).

301. By engaging in the conduct set forth herein, Defendant violated and continues to violate Section 1770(a)(5), of the CLRA, because Defendant's conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices, in that it misrepresents the particular ingredients, characteristics, uses, benefits and quantities of the goods.

302. By engaging in the conduct set forth herein, Defendant violated and continues to violate Section 1770(a)(7) of the CLRA, because Defendant's conduct constitutes unfair methods of competition and unfair or fraudulent acts or practices, in that it misrepresents the particular standard, quality or grade of the goods.

1           303. By engaging in the conduct set forth herein, Defendant violated and continues to  
2 violate Section 1770(a)(9) of the CLRA, because Defendant's conduct constitutes unfair methods  
3 of competition and unfair or fraudulent acts or practices, in that it advertises goods with the intent  
4 not to sell the goods as advertised.

5           304. By engaging in the conduct set forth herein, Defendant has violated and continues  
6 to violate Section 1770(a)(16) of the CLRA, because Defendant's conduct constitutes unfair  
7 methods of competition and unfair or fraudulent acts or practices, in that it represents that a  
8 subject of a transaction has been supplied in accordance with a previous representation when they  
9 have not.

10           305. Plaintiffs request that the Court enjoin Defendant from continuing to employ the  
11 unlawful methods, acts and practices alleged herein pursuant to Cal. Civ. Code § 1780(a)(2). If  
12 Defendant is not restrained from engaging in these practices in the future, Plaintiffs and the Class  
13 will continue to suffer harm.

14           306. Pursuant to Section 1782(a) of the CLRA, on April 17, 2012, Plaintiffs' counsel  
15 served ConAgra with notice of ConAgra's violations of the CLRA. As authorized by ConAgra's  
16 counsel, Plaintiffs' counsel served ConAgra by certified mail, return receipt requested. A true  
17 and accurate copy of the CLRA demand notice is attached hereto as Exhibit F. ConAgra, through  
18 its counsel, acknowledged receipt of the CLRA demand notice, as evidenced by the Domestic  
19 Return Receipt signed by its agent, a true and accurate copy of which is attached hereto as Exhibit  
20 G.

21           307. ConAgra has refused or failed to respond to the CLRA demand notice.

22           308. ConAgra has failed to provide appropriate relief for its violations of the CLRA  
23 within 30 days of its receipt of the CLRA demand notice. Accordingly, pursuant to Sections  
24 1780 and 1782(b) of the CLRA, Plaintiffs are entitled to recover actual damages, punitive  
25 damages, attorneys' fees and costs, and any other relief the Court deems proper.

26           309. Plaintiffs make certain claims in this First Amended Complaint that were not  
27 included in the original Complaint filed on April 2, 2012, and were not included in the CLRA  
28 demand notice. Specifically, Plaintiffs herein allege that Defendant violated the CLRA by:







**NINTH CAUSE OF ACTION**  
**Magnuson-Moss Act (15 U.S.C. § 2301, et seq.)**

329. Plaintiffs incorporate by reference each allegation set forth above.

330. Plaintiffs and members of the Class are “consumers” as defined by 15 U.S.C. § 2301(3).

331. Defendant is a “supplier” and “warrantor” as defined by 15 U.S.C. § 2301(4) & (5).

332. Defendant’s food products are “consumer products” as defined by 15 U.S.C. § 2301(1).

333. Defendant’s nutrient and health content claims constitute “express warranties.”

334. Defendant, through its package labels, create express warranties by making the affirmation of fact and promising that its Misbranded Food Products comply with food labeling regulations under federal and California law.

335. Despite Defendant’s express warranties regarding its food products, it does not comply with food labeling regulations under federal and California law.

336. Defendant breached its express warranties regarding its Misbranded Food Products in violation of 15 U.S.C. §§ 2301, et seq.

337. Defendant sold Plaintiffs and members of the Class Misbranded Food Products that were not capable of being sold or held legally and which were legally worthless. Plaintiffs and the Class paid a premium price for the Misbranded Food Products.

338. As a direct and proximate result of Defendant’s actions, Plaintiffs and the Class have suffered damages in an amount to be proven at trial.

**JURY DEMAND**

Plaintiffs hereby demand a trial by jury of their claims.

**PRAYER FOR RELIEF**

WHEREFORE, Plaintiffs, individually and on behalf of all others similarly situated, and on behalf of the general public, pray for judgment against Defendant as follows:

A. For an order certifying this case as a class action and appointing Plaintiffs and

1 their counsel to represent the Class;

2 B. For an order awarding, as appropriate, damages, restitution or disgorgement to  
3 Plaintiffs and the Class;

4 C. For an order requiring Defendant to immediately cease and desist from selling its  
5 Misbranded Food Products in violation of law; enjoining Defendant from continuing to market,  
6 advertise, distribute, and sell these products in the unlawful manner described herein; and  
7 ordering Defendant to engage in corrective action;

8 D. For all remedies available pursuant to Cal. Civ. Code § 1780;

9 E. For an injunction pursuant to California Health & Safety Code § 111910  
10 restraining Defendant from violating Section 7 of the Sherman Law;

11 F. For an order awarding attorneys' fees and costs;

12 G. For an order awarding punitive damages;

13 H. For an order awarding pre-and post-judgment interest; and

14 I. For an order providing such further relief as this Court deems proper.

15 Dated: June 29, 2012

Respectfully submitted,

17 By: /s/ Ben F. Pierce Gore  
Ben F. Pierce Gore (SBN 128515)  
18 PRATT & ASSOCIATES  
19 1901 S. Bascom Avenue, Suite 350  
Campbell, CA 95008  
20 Telephone: (408) 429-6506  
Fax: (408) 369-0752  
21 pgore@prattattorneys.com

22 Jay Nelkin  
Carol Nelkin  
23 Stuart Nelkin  
NELKIN & NELKIN, P.C.  
24 5417 Chaucer  
Houston, Texas 77005  
25 Telephone: (713) 526-4500  
Facsimile: (281) 825-4161  
26 jnelkin@nelkinpc.com  
cnelkin@nelkinpc.com  
27 snelkin@nelkinpc.com  
28

Don Barrett  
Brian Herrington  
Katherine B. Riley  
David McMullan  
Don Barrett, P.A.  
P.O. Box 927  
404 Court Square North  
Lexington, MS 39095  
Telephone: (662) 834-2488  
Toll Free: (877) 816-4443  
Fax: (662) 834-2628  
[dbarrett@barrettlawgroup.com](mailto:dbarrett@barrettlawgroup.com)  
[donbarrettpa@gmail.com](mailto:donbarrettpa@gmail.com)  
[bherrington@barrettlawgroup.com](mailto:bherrington@barrettlawgroup.com)  
[kbriley@barrettlawgroup.com](mailto:kbriley@barrettlawgroup.com)  
[dmcullan@barrettlawgroup.com](mailto:dmcullan@barrettlawgroup.com)

Charles Barrett  
Charles Barrett, P.C.  
6518 Hwy. 100, Suite 210  
Nashville, TN 37205  
Telephone: (615) 515-3393  
Fax: (615) 515-3395  
[charles@cfbfirm.com](mailto:charles@cfbfirm.com)

Richard Barrett  
Law Offices of Richard R. Barrett, PLLC  
2086 Old Taylor Road, Suite 1011  
Oxford, MS 38655  
Telephone: (662) 380-5018  
Fax: (866) 430-5459  
[rrb@rrblawfirm.net](mailto:rrb@rrblawfirm.net)

J. Price Coleman  
Coleman Law Firm  
1100 Tyler Avenue, Suite 102  
Oxford, MS 38655  
Telephone: (662) 236-0047  
Fax: (662) 513-0072  
[colemanlawfirm@bellsouth.net](mailto:colemanlawfirm@bellsouth.net)

Dewitt M. Lovelace  
Lovelace Law Firm, P.A.  
12870 U.S. Hwy 98 West, Suite 200  
Miramar Beach, FL 32550  
Telephone: (850) 837-6020  
Fax: (850) 837-4093  
[dml@lovelacelaw.com](mailto:dml@lovelacelaw.com)

David Shelton  
Attorney at Law  
1223 Jackson Avenue East, Suite 202  
Oxford, MS 38655  
Telephone: (662) 281-1212  
Fax: (662) 281-1312  
[david@davidsheltonpllc.com](mailto:david@davidsheltonpllc.com)

1 Keith M. Fleischman  
2 Frank Karam  
3 Ananda N. Chaudhuri  
4 FLEISCHMAN LAW FIRM  
5 565 Fifth Avenue, 7<sup>th</sup> Floor  
6 New York, New York 10017  
7 Telephone: 212-880-9571  
8 [keith@fleischmanlawfirm.com](mailto:keith@fleischmanlawfirm.com)  
9 [frank@fkaramlaw.com](mailto:frank@fkaramlaw.com)  
10 [achaudhuri@fleischmanlawfirm.com](mailto:achaudhuri@fleischmanlawfirm.com)

11 Zona Jones  
12 Darren Brown  
13 PROVOST UMPHREY LAW FIRM LLP  
14 490 Park Street  
15 P.O. Box 4905  
16 Beaumont, TX 77704  
17 Telephone: (409) 299-5178  
18 [zjones@provostumphrey.com](mailto:zjones@provostumphrey.com)  
19 [dbrown@provostumphrey.com](mailto:dbrown@provostumphrey.com)

20 *Attorneys for Plaintiffs*